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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CLARK COUNTY, NEVADA,
Petitioner,
v.
FRANK BRISCOE COMPANY, INC., a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a government entity invites bids for performance of a construction contract within a set time, does the successful bidding contractor warrant that the project will be completed within that time period (as prior federal courts have held), or does the government warrant that the project will be completed within the specified time (as the Ninth Circuit held here, in direct conflict with prior authority)?

2. Did the Ninth Circuit infringe Petitioner Clark County's right to sovereign immunity, in conflict with controlling authority of the Nevada Supreme Court, by holding that the County waived the express statutory requirement of strict compliance with state law notice-of-claim provisions when, in compliance with the Federal Rules of Civil Procedure, it filed a compulsory counterclaim against Respondent corporation?

3. Did the Ninth Circuit deny Clark County a fundamentally fair trial when it affirmed the district court's orders:

(a) to continue the trial for twelve weeks, over Clark County's objection, so that the trial judge would avoid FICA deductions from his Senior Judge's salary;

(b) to submit to the jury, over Clark County's objection and without any opportunity to rebut, charts Respondent prepared that were the sole evidence of causal links between the alleged delay-causing events and the alleged breaches of contract; and

(c) to submit to the jury concededly "poorly drafted" special interrogatories "susceptible of misconstruction and overlap," encouraging the award of duplicative damages?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 606, and is reprinted in the Appendix at 2a. The decision and order on motions to dismiss of the District Court for the District of Nevada is reported at 643 F. Supp. 93, and is reprinted in the Appendix at 95a.

JURISDICTION

The Ninth Circuit entered judgment on September 15, 1988, affirming the district court judgment. The Ninth Circuit denied Clark County's petition for rehearing and suggestion for rehearing en banc on December 2, 1988. On February 23, 1989, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including April 1, 1989. Supreme Court Rule 20.4; 28 U.S.C. § 2101(c).

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Ninth Circuit.

STATUTORY PROVISIONS

Section 244.250 of the Nevada Revised Statues provides:

> 1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.
>
> 2. No claim or account against any county shall be audited, allowed, or paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

STATEMENT OF THE CASE

In 1976, pursuant to a federal grant under the Clean Water Act of 1972, Petitioner Clark County, Nevada (the "County"), invited contractors to bid on a wastewater treatment plant construction contract. Bidders had access to detailed plans and specifications for the project, including a requirement that the project be completed within 1200 days. Before formulating and submitting their bids, bidders had an opportunity to evaluate the project requirements and, in particular, the required completion date, in light of their own capabilities.

Respondent Frank Briscoe Company, Inc. ("Briscoe"), a large construction firm headquartered in New Jersey, submitted the low bid of $52.3 million, and the County awarded the contract to Briscoe. As part of the construction agreement, Briscoe expressly promised to complete the project within 1200 days and to pay liquidated damages of $5,000.00 per day for completion delays.

During the construction of the plant, disputes arose between the parties concerning the quality of Briscoe's performance and the impact of particular contract requirements on Briscoe's time and cost of performance. Ultimately, the project was delayed 667 days – nearly two years.

In May 1980, while the plant was under construction, Briscoe, invoking diversity jurisdiction, filed a complaint for breach of contract against the County and other defendants. Briscoe sought only equitable and declaratory relief – specific performance and a disclaimer of liability – from the County, although it did seek compensatory damages from other named defendants. In compliance with the Federal Rules of Civil Procedure, the County filed a compulsory counterclaim for breach of contract.

Without ever filing a notice of claim with the County, Briscoe responded to the County's compulsory counterclaim by filing a "counterclaim-in-reply," seeking damages "in as yet undetermined amount." More than three years later, the district court granted Briscoe's motion to file an amended complaint seeking specific damages for its "counterclaim-in-reply."

In its motion to dismiss the amended complaint, the County argued that the action was barred by sovereign immunity because Briscoe had failed to file the notice of claim expressly required by section 244.250 of the Nevada Revised Statutes. The district court denied the motion to dismiss without prejudice. The court acknowledged that section 244.250 applied, that Briscoe had not formally complied with the statute, and that compliance was not waived under *State v. Capital Convalescent Center,* 92 Nev. 147, 151-52, 547 P.2d 677, 680 (1976) (state waives claims statute when state sues first). The court nonetheless denied the motion on the ground that Briscoe had "substantially complied" with the purpose of the statute (Appendix, hereafter "App." 111a).

The jury trial began on November 13, 1985. After twenty days of proceedings, the trial was adjourned for the holidays. On December 30, 1985, the district court sua sponte extended the recess until March 3, 1986. Judge Foley attached to his minute order a letter from the Director of the Administrative Office of the United States Courts, which advised Senior United States Judges wishing to avoid having FICA taxes withdrawn from their salaries "to cease performing judicial duties during the first 60 to 90 days of 1986." (App. 114a).

Responding to the lengthy continuance,[1] the County moved for a mistrial, claiming that the continuance was prejudicial. The court denied the motion (App. 85a).

After the close of Briscoe's case, the County moved for a directed verdict, and again raised as a defense Briscoe's failure to file the notice of claim required by statute. The court again denied the motion. This time, however, the court held that Briscoe's "counterclaim-in-reply" had itself been a compulsory counterclaim and therefore the notice-of-claim statute did not apply under the *Capital Convalescent* rule (App. 65a).[2]

At the end of the trial, immediately before the jury retired, the judge authorized Briscoe to submit to the jury argumentative reference charts it had created to illustrate its damage theories, even though the judge acknowledged that the charts had not been introduced into evidence and the County had had no opportunity to rebut the charts (Reporter's Transcript, hereafter "RT" 15,636, 15,640). The County's objections were ignored.

The district court also instructed the jury, over the County's objection, that

> The contract implies a warranty by the County that Briscoe, if it complies with the contract documents,

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[1]The district court issued another order extending the continuance to March 11.

[2]At the oral argument on the County's motion for judgment notwithstanding the verdict, the court reversed itself again and repudiated its reliance on *Capital Convalescent;* the court stated that it was not basing its decision on "jurisdictional grounds or constitutional grounds or purely legal grounds." Instead the court "just doesn't think it would apply." (January 12, 1987 Reporter's Transcript at 74-75).

> would be able to complete the work within the contemplated period of time.

(RT 15,514-15).[3]

This erroneous instruction resulted in the jury returning one of the largest verdicts in Nevada history against the County. The district court reduced the verdict by a remittitur of $275,000, to reflect Briscoe's promise to pay liquidated damages of $5,000 per day for completion delays. Consequently, the final judgment entered against the county was for $24.3 million (App. 22a).

On September 15, 1988, the Ninth Circuit affirmed the judgment. Even though Briscoe had first filed suit, the court improperly applied *Capital Convalescent,* and held that Briscoe could maintain an action for money damages without filing a notice of claim (App. 7a-11a).

The court of appeals also upheld the lower court's instruction that the County had impliedly warranted that the contract was performable within the stated time period. Although the court also found that the district court had erred in failing to deliver the County's proffered instruction – that Briscoe had warranted that it could complete the project within the specified time period – the court erroneously held that this error was harmless (App. 12a-15a).

The court further found that continuing the trial nine weeks to avoid FICA deductions was "somewhat unusual," that the unrebutted charts lacked any evidentiary basis, were vague,

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[3]The district court refused to deliver the County's requested instruction that Briscoe, by entering into the contract, warranted that it could complete the project within the specified time.

confusing, and absurd, and that the special interrogatories were "poorly drafted" and "susceptible of misconstruction and overlap." Nonetheless, the court held these errors harmless as well (App. 12a, 15a-21a). Subsequently, the Court rejected a petition for rehearing and a suggestion for rehearing en banc (App. 1a).

Each of these errors standing alone are sufficient to require reversal. The combination, though, firmly establishes that the decisions below do not comport with existing case authority and denied the County a fair trial.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT RULE CONFLICTS WITH SETTLED PRINCIPLES AND DRASTICALLY SHIFTS TO THE GOVERNMENT ANY RISK OF UNTIMELY COMPLETION OF CONSTRUCTION CONTRACTS

The Ninth Circuit's holding that the government warrants that the contracting party can complete the contract within the contractually prescribed time period drastically shifts the allocation of risk between governmental entities and contractors in construction law and, if followed by other courts, could have a staggering budgetary impact on the United States, each State, and each of their subdivisions. This Ninth Circuit holding conflicts with an often-cited landmark decision of the Court of Claims, and unexpectedly opens up to challenge a previously established set of rights and duties involving public works construction contracts (and possibly even private construction contracts). Consequently, there is an undisputed need for resolution of this conflict between the Ninth Circuit and other federal courts.

A. The Decision Below Conflicts With Settled Principles Set Forth By the Court of Claims

A construction contract is fundamentally a risk allocation device. Briscoe, the successful bidder here, expressly promised the County in the construction contract that it would complete the project within 1200 days and would pay liquidated damages for delay. Briscoe thus expressly assumed the risk that it would not complete the project on time. Briscoe's express assumption of risk of any delay comports with a well-developed line of construction contract decisions that has held that a *contractor,* by entering into the contract, warrants that it will complete the project by the due date, and assumes the risk that it will not complete the project on time. *American Ship Bldg. Co. v. United States,* 654 F.2d 75, 78 (Ct. Cl. 1981).[4]

The reasons for allocating the risk of untimely completion of the contract to the contractor are straightforward. The contractor examines the specifications and makes a business judgment, based on the nature of the specifications and its own capabilities, whether it can complete the contract by the due date. As the *American Ship Building* case recognizes, the contractor knows best its capabilities, and knows best the labor and equipment it is willing to commit to the project. *Id.* Because the government does not normally have access to the bidder's capabilities, intentions, or resources, the government cannot be held to

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[4]*Accord J.F. Shea Co. v. United States,* 4 Cl. Ct. 46 (1983); *Development Management Consultants, Inc.,* 85-3 B.C.A. (CCH) ¶ 18,338, at 91,972 (1985); *Dewey Elecs. Corp.,* 85-3 B.C.A. (CCH) ¶ 18,228, at 91,516 (1985); *Finast Metal Prods., Inc.,* 85-1 B.C.A. (CCH) ¶ 17,873, at 89,521 (1985); *P&L Inv. Corp.,* 83-1 B.C.A. (CCH) ¶ 16,285, at 80,914 (1983); *Paragon Corp.,* 83-1 B.C.A. (CCH) ¶ 16,521 (1983); *James Walford Constr. Co.,* 83-1 B.C.A. (CCH) ¶ 16,277 at 80,875 (1982).

impliedly warrant that the bidder will complete the project within the contractual time limit. Rather, the government invites those who are willing to represent that they can perform within the specified time to submit bids. *Id.*

Yet, in the face of this analysis, the Ninth Circuit rejected this longstanding authority and expressly held that the governmental entity impliedly warrants that the contract was performable within the stated time frame. The contract did not refer to Briscoe's capabilities, resources, or require any particular staffing or equipping of the construction project. Thus, if Briscoe followed the contract documents, but incurred delay because, for example, it understaffed the project or had insufficient equipment at the project, the jury would still have been *required* under the lower court's erroneous instruction to hold the County liable for any delay.

The result directly conflicts with *American Ship Building* and its progeny. The holding drastically reallocates from the contractor to the owner the risk of untimely performance in construction contracts generally and places a staggering budgetary burden on governmental entities, which for the first time will be held to warrant the contractor's time of completion whenever a contract specifies a completion date. In order to avoid the application of this erroneous rule in other cases, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

B. The Court of Appeals Confused the Warranty of Adequate Specifications with the Warranty of Timely Completion

The court of appeals correctly noted that the County, by requiring construction according to its specifications, impliedly warranted that the specifications would be suitable, and that the County would be liable for delays caused by faulty

specifications. *See United States v. Spearin*, 248 U.S. 132 (1918). But this warranty of adequate specifications applies only to delays *caused by faulty specifications;* no decision has ever before held that the owner warrants not only the adequacy of specifications, but also that the contractor will be able to complete the project on time, regardless of the adequacy of the specifications. Logically, only the contractor has sufficient knowledge to be fairly allocated the risk of untimely completion. Thus, the opinion transformed the *Spearin* warranty of adequate specifications into an unprecedented warranty of timely completion by the County.[5]

The potential impact of the new rule on public works contracts throughout the nation is starkly revealed by the magnitude of the error in this case. Pursuant to special interrogatories, the jury attributed 612 days of delay to the County. Because the jury attributed only 82 days of delay to faulty specifications, 530 days were attributed to reasons other than faulty specifications. More simply put, the jury could have wrongfully attributed to the conduct of the County more than eighty percent of the damages awarded.

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[5]The opinion notes that the time-of-completion warranty instruction tracks language in two Court of Claims opinions construing *Spearin*. Although both cases used language similar to the instruction here, neither case supports the instruction. In *Laburnam Constr. Corp. v. United States*, 325 F.2d 451, 457 (Ct. Cl. 1963), the court noted that "the critical factor in this case is that *all* of the delay to which plaintiff was subjected came about because the specifications were deficient," and noted: "*If* faulty specifications prevent or delay completion of the contract, the contractor is entitled to recover damages for the defendant's breach of its implied warranty." (Emphases added.) In *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965), the court explicitly held that the contractor had "assumed the substantial risk of completing the project within the tight schedule of 540 days."

Under *Spearin*, the County could have been liable under an implied warranty theory for the 82-day delay caused by faulty specifications, but not the 530 days attributed to other causes. Yet the new rule promulgated by the court of appeals allowed the jury to attribute those 530 days to the breach of the purported implied warranty of timely completion.

C. The Error Was Not Harmless

The court of appeals correctly noted that the trial court erred in failing to give a proper instruction, submitted by the County, that Briscoe, by entering into the contract, warranted that it could complete the contract within the specified time. See note 3, *supra*. The Court erred, however, in concluding that the error was harmless on two independent grounds.

The court first reasoned that a "roughly equivalent" instruction was given (App. 15a). But that instruction stated only that Briscoe had a duty to see that the job was performed in a *workmanlike manner*, according to the contract plans and specifications. In light of the explicit instruction that the County warranted the *time* of completion, the jury could not have read this "workmanlike manner" instruction to impose on Briscoe a warranty that it would complete the project by the agreed-upon completion date.[6]

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[6]Moreover, the two instructions are mutually inconsistent. The risk of noncompletion by the due date must fall on one party or the other. In construction contract cases, it is the contractor, not the owner, who should assume the risk of untimely completion. Liquidated damages provisions, like the one here, evidence the contracting parties' intent that the contractor is solely responsible for timely performance.

The court of appeals also concluded that the district court's $275,000 remittitur covering the 55 days of delay the jury found was attributable to Briscoe sufficiently compensated the County, because "[a] time of completion warranty by Briscoe would have been excused to the extent the delay was caused by the County." (App. 15a). This reasoning overlooks the probability that, given correct instructions, the jury would not have attributed delay to the County at all, except for the 82 days due to faulty specifications. Under the instructions as given, if the jury was unsure who caused a delay, it was required to impose liability against the County; properly instructed, however, the jury would not have imposed liability on the County, but instead may have imposed liability on Briscoe.

The combination of permitting the jury to be instructed that the County warrants that the contractor can complete the agreement during the fixed time frame, along with refusing to instruct the jury that the contractor had warranted that it would be able to complete the contract within the contractually agreed-upon period, permitted the jury to award damages on a strict liability basis. This is simply wrong and hardly harmless error.

II. THE COURT OF APPEALS INFRINGED NEVADA'S SOVEREIGN IMMUNITY BY HOLDING THAT A GOVERNMENTAL ENTITY WAIVES THE STATUTORY REQUIREMENT OF STRICT COMPLIANCE WITH A NOTICE-OF-CLAIM RULE BY FILING A COMPULSORY COUNTERCLAIM

Nevada, like the United States, conditions its waiver of sovereign immunity on the requirement that claimants file a notice of claim with a government entity before a suit for money

damages is initiated against the entity.[7] The purpose of a notice of claim statute is to: (1) apprise the agency of the claim; (2) permit the agency to investigate the claim and institute remedial actions; (3) encourage early settlement without litigation; and (4) notify the appropriate budgetary officers. *E.g., Hansen-Neiderhauser, Inc. v. Nevada State Tax Comm'n,* 81 Nev. 307, 402 P.2d 480, 482 (1965); *City of Reno v. Fields,* 69 Nev. 300, 250 P.2d 140, 143 (1952); *Mammo v. State,* 138 Ariz. 528, 675 P.2d 1347 (Ct. App. 1983). Nevada's notice of claim statue on its face must be "strictly complied with." Here, the Ninth Circuit and the district court ignored the express language and purpose of the statute, and controlling case authority. In fact, the court of appeals invites litigants to circumvent notice-of-claim statutes by first seeking declaratory relief and later amending the action to seek damages. This result should not be countenanced.

A. The Court Overlooked the Purposes of Notice-of-Claim Statutes

In its decision, the court of appeals limited its focus to one purpose of the notice statute – to avoid surprise. The court apparently reasoned that the County had actual knowledge of the contract dispute, and this knowledge excused Briscoe from complying with the notice statute because the County was not "surprised." (App. 11a).

This approach frustrates other important statutory goals, including the paramount goal of encouraging settlement *without* litigation. Moreover, the decision in this regard conflicts with the overwhelming weight of authority that actual knowledge by

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[7]The notice-of-claim statute does not apply to an action where no damages are claimed. *Hart v. City of Las Vegas,* 73 Nev. 29, 307 P. 2d 617 (1957).

the government of the underlying events cannot substitute for compliance with a notice statute. *See* Annotation, *Actual Notice or Knowledge by Governmental Body or Officer of Injury or Incident Resulting in Injury as Constituting Required Claim or Notice of Claim for Injury – Modern Status*, 7 A.L.R.4th 1063, 1065 (1981). Indeed, the very essence of the notice of claim statute is to prevent disputes over such issues as actual knowledge from unnecessarily clogging the already overburdened judicial system.

B. The Holding Infringes Nevada's Sovereign Immunity

Under the Ninth Circuit's decision, a claimant need not bother to comply with the technicalities of a notice requirement. All it need do is precisely what Briscoe did here – file an action for equitable or declaratory relief, where no notice is required. So long as the agency has a counterclaim that it chooses not to abandon, the claimant can then sue for damages in a "counterclaim-in-reply."[8] Thus, the Ninth Circuit's holding not only subverts the legitimate purposes of notice statutes, but also runs afoul of the constitutional barrier of sovereign immunity. Whenever the State entity must file a compulsory counterclaim, the court's rationale frustrates the legitimate preconditions the State has established for a waiver of sovereign immunity.[9]

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[8]As the court of appeals noted, the Federal Rules of Civil Procedure do not authorize a "counterclaim-in-reply." The court of appeals relied on the holding in *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1525 (9th Cir. 1985), for the proposition that a counterclaim-in-reply may be used where the claims are compulsory.

[9]Such a holding also conflicts with the rule that, even though the government waives its sovereign immunity to some extent when it files an action, "no waiver of immunity occurs to the extent the counterclaimant seeks an affirmative recovery."

The Ninth Circuit justified noncompliance with the notice requirements by reasoning that it would have been inequitable to require Briscoe to file a notice of claim here because the claims period had expired before the County filed its compulsory counterclaim. This rationale cannot withstand scrutiny. It is factually wrong and theoretically flawed.

On the facts, Briscoe had time to file its notice of claim after the County filed its counterclaim. Briscoe filed its counterclaim-in-reply on September 15, 1980. Yet the original plant completion date was June 29, 1980, the County extended that date 210 days, to January 25, 1981, and actual completion occurred on April 26, 1982. Consequently, no actual delay had yet occurred, and Briscoe had ample time to file a notice of claim *before* it filed its counterclaim for damages. Had Briscoe taken that step, the County would have had the opportunity to consider settlement, with full knowledge of Briscoe's claim for damages.

Moreover, it would not have been inequitable to require compliance. Briscoe initiated the litigation, and the County had no discretion over the timing of its compulsory counterclaim. As soon as Briscoe filed suit against the County, the County had to raise its compulsory counterclaim or waive it under the strictures of the Federal Rules of Civil Procedure. Thus,

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Chamberlain v. United States, 687 F. Supp. 1534, 1536-37 (S.D. Ala. 1988); *United States v. Timmons,* 672 F.2d 1373, 1379-80 (11th Cir. 1982). This rule was set out in *Frederick v. United States,* 386 F.2d 481, 488 (5th Cir. 1967), on which *Capital Convalescent* relied. *Compare* 92 Nev. at 151-52, 547 P.2d at 680 *with* 386 F.2d at 489. Thus, even if the court of appeals were correct that Briscoe need not comply with the notice statute because the County first sought a monetary recovery, the waiver applies only to defeat the County's claims, and cannot entitle Briscoe to any affirmative damages.

Briscoe, not the County, dictated the timing of the County's damages claim and the court of appeals identified no justifiable basis for not requiring strict compliance with the notice-of-claim statute in these circumstances.

Although Nevada law recognizes that if the government first sues, the claimant may file a counterclaim without statutory notice, *e.g., State v. Capital Convalescent Center*, 92 Nev. 147, 547 P.2d 677 (1976), here the claimant, not the County, initiated the litigation. At most, the County waived compliance with the notice statute to the extent of permitting the claimant to defeat the County's claims. *E.g., United States v. Timmons*, 672 F.2d 1373, 1379-80 (11th Cir. 1982). But here the decisions below went much further. They subvert totally the statutory requirement of strict compliance with the Nevada claims statute, thereby increasing the burdens on the Nevada and federal judicial systems.

III. CUMULATIVE TRIAL ERRORS DEPRIVED CLARK COUNTY OF A FUNDAMENTALLY FAIR TRIAL

In addition to these plain legal errors, the courts below sanctioned errors in the way the trial was conducted,which denied the County a fair trial. The huge verdict and judgment here was obtained as the result of: (1) a twelve-week continuance in the middle of the plaintiff's case that cemented the jury's predictable pro-plaintiff leanings at that stage of the proceeding; (2) the submission to the jury of unrebutted argumentative charts that allowed Briscoe an unfair opportunity to draw for the jury inferences that were never proved or argued at trial; and (3) misleading special interrogatories that instructed the jury to cumulate redundant and overlapping damages.

A. The Continuance

After 18 days of plaintiff's testimony, the district judge, on his own motion, continued the trial from December 30, 1985 to March 11, 1986, to avoid having FICA taxes deducted from his salary. The County moved for a mistrial and submitted an affidavit by Dr. Elizabeth Loftus, a renowned expert in jury decisionmaking, who concluded:

> In summary, I believe the recess in the trial is likely to have helped jurors to have solidified whatever pro-plaintiff orientation they had developed by hearing a major portion of the plaintiff's case, and I believe the process of refreshing the jurors' memories, which will inevitably occur, further disadvantages the defendant.

(App. 93a-94a).

The court of appeals concluded that the district court had not abused its discretion in denying a mistrial, because Dr. Loftus explained that the pro-plaintiff orientation had been developed by hearing "a major portion of the plaintiff's case" and the County offered no evidence to show that the jury had heard "a major portion of the plaintiff's case." (App. 12a).

Yet the opinion overlooks the evidence of record that Briscoe had already presented 14 witnesses whose testimony covered 3,666 pages of transcript. In the 24 days of Briscoe's case-in-chief after the continuance, Briscoe presented 16 witnesses whose testimony covered 4,213 pages of transcript. Substantively, the record discloses that Briscoe's witnesses before the continuance covered all aspects of its case except damages. Before the continuance, fact and expert witnesses testified on the major technical construction issues and on the key issue of engineering responsibility.

Given the unrebutted evidence of record and affidavit of Dr. Loftus, and given that the delay was ordered sua sponte by the district court, unjustified by any emergency or need connected with the trial, the district court abused its discretion in denying a mistrial. The continuance introduced an element of uncertainty that is inappropriate in our system of trial by jury.

B. Argumentative Reference Charts

The district court instructed Briscoe to prepare charts to demonstrate the causal link between each alleged delay-causing event and the corresponding alleged breach of contract (RT 8401-02). The charts were supposed to be used during Briscoe's closing argument and the County was supposed to have an opportunity to respond to them in its closing argument (App. 33a-34a).

Rather than comply with the court's directive, however, Briscoe waited until *after the County's final argument* to produce its reference charts that asserted connections between breaches and effects that the trial court found had neither been proved nor argued (App. 34a).[10]

Although the County objected to submitting the argumentative charts to the jury without an opportunity to rebut them, and the court recognized that Briscoe was at fault for surprising the court and defense counsel with the charts at the eleventh hour (RT 15,640), the court allowed the charts to go to the jury. In denying the County's motion for judgment notwithstanding the verdict or a new trial, the court found that

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[10]Indeed, the court explicitly stated that "no Briscoe witnesses had directly tied the 10 breaches of contract to specific delay-causing events which were the consequences of the breaches of contract . . . ." (App. 35a).

any error was harmless because the charts "did not clearly make the connection between each claimed breach of contract and each delay-causing event," and the jury "could not have intelligently relied upon the charts at all." (App. 35a-36a). The Ninth Circuit also embraced this rationale.

The courts below relied on a harmless error analysis lacking in factual or legal justification. The trial court expressly instructed the jury that the charts were designed to assist them (RT 15,590, 15,656-58), and the jury obviously could have relied on them in reaching its verdict (*see* App. 41a-60a). Accordingly, the error in submitting this argumentative, unrebutted evidence to the jury could not have been harmless.[11]

C. Special Interrogatories

The district court submitted special interrogatories to the jury. Each special interrogatory set forth an alleged breach of contract based on Briscoe's amended complaint. Although the district court and the court of appeals acknowledged that some of the special interrogatories were "poorly drafted" and "susceptible of misconstruction and overlap," both courts concluded that the jury would not have been misled (App. 20a, 33a).

Yet even a casual reading of the interrogatories shows that the jury was invited to award overlapping, duplicative damages. For example, interrogatory eight directed the jury to award delay damages against the County if it found that the County "delayed, disrupted and interfered with the performance of work." In

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[11]Even if the court of appeals was correct that the charts lacked any evidentiary basis, and were repetitive, vague, confusing, and absurd, there is no basis for concluding that the jury could not have relied on them. *See, e.g., Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954) (introduction of improper material into jury room presumed to have influenced jury deliberations).

interrogatory ten, the court directed the jury to award delay damages against the County if it found "that in addition to interfering with scheduling, the County unreasonably interfered with the performance of [Briscoe's] work."[12]

The jury could hardly have avoided awarding duplicative damages, given these interrogatories. As the court of appeals noted, the trial court expressly instructed the jury to consider the interrogatories "one by one, one at a time"; at no point, despite specific objection by the County (RT 15,618), did the court instruct the jury to eliminate overlap when the same days of delay were caused by one or more alleged breaches. Accordingly, the jury may well have felt compelled to award duplicative damages.

In sum, the special interrogatories did not adequately present the contested issues to the jury, did not submit the issues fairly, and did not clearly submit the ultimate questions of fact. *See Dreiling v. General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975). The County was seriously prejudiced when the court strictly instructed the jury to answer the interrogatories one at a time and then cumulate the results, without giving any cautionary instruction about duplication of damages.

This potential for an award of duplicative damages was compounded when the jury considered the reference charts corresponding to each special interrogatory. For example, the chart corresponding to the eighth interrogatory lists 34 consequences, while the tenth lists 33. Fully 31 of these "consequences" are identical. Thus, not only did the special interrogatories invite an award of duplicative damages, but the reference charts encouraged the jury to follow that improper course.

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[12]The jury found 100 days of delay under the eighth interrogatory and 115 under the tenth.

The combined effect of these three rulings below – the continuance, the jury's use of argumentative reference charts, and the special interrogatories – leads inescapably to the conclusion that the County was denied a fundamentally fair trial.

CONCLUSION

For the reasons set forth, the County submits that the petition for a writ of certiorari should be granted.

Dated: March 31, 1989.

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88-1607

No.

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CLARK COUNTY, NEVADA,
Petitioner,
v.

FRANK BRISCOE COMPANY, INC., a Corporation,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 87-2230
D.C. No. CV-80-0135-RDF

FRANK BRISCOE COMPANY, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY
Defendant-Appellant.

ORDER

Filed December 2, 1988

The panel has voted to deny the petition for rehearing. Judges Schroeder and Fletcher reject the suggestion for rehearing en banc and Judge Boochever so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 87-2230
D.C. No. CV-80-0135-RDF

FRANK BRISCOE COMPANY, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY
Defendant-Appellant.

OPINION

Filed September 15, 1988

SUMMARY

Courts and Procedure

The court affirmed the jury verdict against Clark County, holding that Nevada's notice-of-claim statute did not bar the damage award.

Frank Briscoe Co., Inc. was awarded Clark County's contract for construction of an advanced wastewater treatment plant. Briscoe filed an action when a number of disputes arose during plant construction and it was faced with lengthy delays and huge cost overruns. The County filed a breach of contract counterclaim against Briscoe and Briscoe filed a counterclaim in reply. Briscoe completed the project while suit was pending.

After an 87-day trial, 2,200 exhibits, and 19 expert witnesses, the jury found for Briscoe in the sum of $16.24 million in damages. The County appealed numerous issues, one of which contended this case should not have progressed to trial because Briscoe's counterclaim in reply failed to comply with Nevada's notice-of-claim statute.

[1] The court agreed with Briscoe that the case law rule stating a defendant's failure to comply with an analogous notice statute did not bar it from filing a compulsory counterclaim against the state should be read to include counterclaims in reply such as that filed by Briscoe. [2] The court rejected the County's contention, concluding that when the County initiates a monetary damage claim, it does not matter which party originally filed the suit. The purpose of the notice statute is to minimize surprise claims and there was no problem with surprise in this case. [3] The court also held in response to the numerous other issues brought by County that the district court did not abuse its discretion by granting a continuance during the trial, that the jury was adequately instructed regarding contract warranties, and that it was more than likely that the special interrogatories submitted did not confuse the jury.

COUNSEL

William N. Alsup, San Francisco, California, for the defendant-appellant.

Morton R. Galane, Las Vegas, Nevada, for the plaintiff-appellee.

OPINION

BOOCHEVER, Circuit Judge:

Clark County, Nevada appeals a jury verdict in favor of Frank Briscoe Co., a New Jersey corporation. Briscoe filed a

diversity action in the District of Nevada in connection with a contract to construct a wastewater treatment plant. The jury awarded Briscoe $16.24 million in damages against the County, which was reduced by $275,000 upon Briscoe's acceptance of a remittitur.

The County contends on appeal that Nevada's notice-of-claim statute barred the damage award; a continuance during the trial was prejudicial; the jury was instructed improperly on contract warranties; special interrogatories formulated by the district court were ambiguous and confusing; and unrebutted, argumentative reference charts prepared by Briscoe improperly were submitted to the jury. We affirm the jury's verdict.

I.

In September 1976, the County requested bids for construction of an advanced wastewater treatment plant. Nevada Environmental Consultants (NECON), an engineering joint venture, provided design services to the County for the project, including the plans, specifications, and bidding documents used by the contractors in formulating their bids. Briscoe submitted a $52.3 million bid and was awarded the contract in March 1977. Pursuant to the design specifications, Briscoe's contract with the County mandated completion of the plant by June 29, 1980, a period of 1,200 days.

Morrison-Knudsen Co., a construction manager, served as the County's project representative. NECON's contract to provide engineering services was terminated by the County in October 1977, about seven months after construction had begun. H.K. Ferguson Co. provided interim engineering services on the project until February 1978, when URS Forrest & Cotton was named successor engineer. These firms did not have access to NECON or its design analysis or calculations.

A number of disputes arose during plant construction. The County contends that these disputes concerned the quality of Briscoe's performance and the impact of certain contract requirements on Briscoe's time and cost of performance. Briscoe insists that the County failed to provide engineering services as required by the contract and that the successor engineers, endeavoring to correct NECON's errors and omissions, compounded these problems by shifting responsibility for redesigning the plant to Briscoe under the guise of contract interpretation.

Pursuant to an amending provision in the contract, Briscoe submitted numerous written requests to Morrison-Knudsen for time and price adjustments. Briscoe contends that with few exceptions, the County refused to accept the blame for construction delays or otherwise recognize the merits of Briscoe's protests. The County notes that 217 change orders were approved, extending the completion date 210 days and increasing the contract price by more than $675,000.

Faced with lengthy delays and huge cost overruns, Briscoe filed this action in May 1980 in the District of Nevada against the County, Morrison-Knudsen, both successor engineers, and nine other defendants. Briscoe sought specific performance of the contract and injunctive and declaratory relief against the County, but did not seek damages. In July, the County filed a breach of contract counterclaim against Briscoe. In September 1980, Briscoe responded by filing "counterclaims in reply" against the County for breaches of contract and warranty, seeking damages "in an amount to be established at the trial."

Briscoe continued construction of the treatment plant while its suit was pending. The project was completed in April 1982, fifteen months after the adjusted contract deadline. In September 1983, three years after filing its counterclaims in reply, Briscoe submitted in connection with the litigation a summary of

damages totaling $49 million. Briscoe filed an amended complaint in April 1984 which requested $70 million each in compensatory and punitive damages. Two weeks later, the County moved to dismiss ten counts of the amended complaint.

The jury trial began on November 13, 1985 and was adjourned for the holidays between December 19, 1985 and January 6, 1986. The recess was extended until March 3 by District Judge Roger D. Foley *sua sponte* in a minute order. Judge Foley attached to the order a letter from the Administrative Office of the United States Courts which advised senior district judges wishing to avoid having FICA taxes deducted from their salaries "to cease performing judicial duties during the first 60 to 90 days of 1986" in light of pending legislation. The County moved for a mistrial, claiming that the continuance, extended again until March 11, was prejudicial. The motion was denied.

The district court ruled on the County's two-year old motion to dismiss on March 3, dismissing each of the defendants except the County and striking portions of the amended complaint. *Frank Briscoe Co. v. County of Clark*, 643 F. Supp. 93 (D. Nev. 1986). The trial was then resumed, and lasted a total of eighty-seven days. The parties presented more than 2,200 exhibits and nineteen expert witnesses testified.

The County was granted a partial directed verdict in July 1986, leaving for jury consideration thirteen claims from a single count of Briscoe's amended complaint. The court formulated ten special interrogatories from these claims, requiring the jury to determine specifically whether the County breached the contract and caused Briscoe to delay completion of the treatment plant by:

(1) terminating NECON as project engineer;
(2) failing to provide essential engineering services;
(3) dividing the project into four segments;

(4) requiring segmentation of progress scheduling;
(5) failing to review pre-bid submittals;
(6) submitting defective plans and specifications;
(7) failing to timely process change orders;
(8) disrupting and interfering work scheduling;
(9) failing to timely approve shop drawings; and
(10) interfering with work performance.

The jury found for Briscoe on eight of the ten interrogatories and determined that the County was responsible for 612 of the 667 days the project was delayed.

The interrogatories did not ask for a particular damage value for each day of delay. The jury instead awarded Briscoe a general verdict of $16.24 million in damages. The court denied the County's motion for judgment notwithstanding the verdict or a new trial when Briscoe accepted a $275,000 remittitur. Judge Foley determined that the remittitur was necessary to offset an erroneous jury instruction regarding the County's counterclaim for liquidated damages under the contract for delays caused by Briscoe.[1]

II.

A. Notice-of-Claim Statute

The County initially contends that this case should not have progressed to trial because Briscoe failed to comply with Nevada's notice-of-claim statute. It provides:

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[1]The contract provided for liquidated damages of $5,000 per day for delays in substantial completion of the plant. In its answers to the special interrogatories, the jury found that the County was *not* responsible for 55 of the 667 days the project was delayed.

> 1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.
>
> 2. No claim or account against any county shall be . . . paid by the board of county commissioners, or any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

Nev. Rev. Stat. § 244.250 (1985).

In his decision and order denying the County's motion to dismiss, Judge Foley found that Briscoe had not formally presented its claim to the Board of County Commissioners of Clark County. *Briscoe*, 643 F. Supp. 93, 100. He nevertheless concluded that the statute did not bar Briscoe's suit:

> This Court does not wish to exalt technical form over substance and throw Briscoe out of court. Whether unconstitutionality, waiver, estoppel, substantial compliance or some other grounds are assigned as the reason, it seems it would be unconscionable to dismiss Briscoe's claims for such technical noncompliance.

Id. at 103. Briscoe does not challenge the constitutionality of section 244.250 on appeal, but contends that strict compliance with the statute was excused in this case by waiver, estoppel, or substantial compliance.

We may affirm the district court's decision on any ground finding support in the record. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988). We believe that a waiver rule adopted in 1976 by the Supreme Court of Nevada for compulsory counterclaims similarly exempts Briscoe's counterclaims in reply from the operation of the

statute. We therefore do not address Briscoe's other excuses for noncompliance.

The interpretation of Nevada's notice-of-claim statute is a question of state law reviewed de novo. *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910, 912 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986). The decisions of a state's highest court are binding on a federal court sitting in diversity. *Id.* at 913. In the absence of controlling state law, however, the court "must use its own best judgment in predicting how the state's highest court would decide the case." *Takahashi v. Loomis Armored Car Serv.*, 625 F.2d 314, 316 (9th Cir. 1980).

In *State v. Capital Convalescent Center*, 92 Nev. 147, 547 P.2d 677 (1976), the Supreme Court of Nevada ruled that a defendant's failure to comply with an analogous notice statute did not bar it from filing a compulsory counterclaim against the state:

> It would be anomalous to hold that a defendant, in court in an action he did not bring, is required to plead a counterclaim against the State because it is compulsory under Rule 13(a), but once pled, his counterclaim is subject to dismissal on the ground that he had not, before being sued, taken affirmative action [under the notice statute]. Such a conclusion is consistent with the purpose of the statute, which is to prevent the State, a county, or a city from being surprised by claims it has not had time to consider administratively. As long as the same transaction or occurrence is involved, surprise is minimized.

92 Nev. at 151-52, 547 P.2d at 680.

[1] Briscoe argues that the *Capital Convalescent* rule should be read to include counterclaims in reply filed by plaintiffs. We believe that such an interpretation is consistent with the policy behind *Capital Convalescent.*

The notice statute was inapplicable to Briscoe's original complaint because it sought from the County only equitable relief. *See Hart v. City of Las Vegas*, 73 Nev. 29, 31, 307 P.2d 617, 618 (1957). Briscoe requested specific performance on the contract and a judgment declaring that it would not be responsible if the plant did not meet the specified performance requirements.

The County's subsequent counterclaim for damages for breach of contract was compulsory under Fed. R. Civ. P. 13(a) because it arose out of the same transaction or occurrence that was the subject matter of Briscoe's claim. *Seattle Totems Hockey Club, Inc. v. National Hockey League*, 652 F.2d 852, 854 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Briscoe, which could not have sued the County directly for damages without complying with the notice statute, then filed its counterclaims in reply. Although this pleading is not expressly authorized by the Federal Rules, it may be used where, as here, the claims are compulsory. *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1525 (9th Cir. 1985). Briscoe later amended its complaint to include claims for damages against the County.

The County contends that the *Capital Convalescent* waiver rule should be limited to cases where a defendant is haled into court by the government. It states that the policy behind the rule is to prevent a government entity, subject to a normal statute of limitations, from filing suits with impunity after the expiration of the usually shorter notice period. The County suggests that a contractor-defendant which either was unaware of its claim or had chosen not to sue could unjustifiably be injured in such a situation. Adopting the County's theory in this case would, of

course, bar Briscoe's breach of contract action, maintain the County's counterclaim, and result in exactly this type of injustice.

[2] Briscoe reasons that the purpose of the notice statute is to prevent the County "from being surprised by claims." *Capital Convalescent*, 92 Nev. at 152, 547 P.2d at 680. When the County initiates a monetary damage claim, it does not matter which party originally files suit. As noted by the Nevada court, surprise is minimized if the same transaction or occurrence is involved. *Id.* Briscoe's view is the better one under Nevada law. We conclude that compliance with section 244.250 was not required in this case.

B. Continuance and Motion for Mistrial

The County argues that the district court erred by adjourning the jury trial for twelve weeks between December 1985 and March 1986 and by refusing to grant a mistrial. A decision whether to order a continuance is reviewed for abuse of discretion. *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). "Experience tells us that in most situations we should defer to the trial judge's decision in granting or denying the continuance." *Id.* Similarly, because of the unique ability of the district court to estimate the needs of a particular case, the denial of a mistrial will be upheld absent a clear abuse of discretion. *United States v. Smith*, 790 F.2d 789, 795 (9th Cir. 1986).

The County's motion relied on the affidavit of Dr. Elizabeth Loftus, a psychology consultant, which stated:

> I believe the recess in the trial is likely to have helped jurors to have solidified whatever pro-plaintiff orientation they had developed by hearing a major portion of the plaintiff's case, and I believe the process

> of refreshing the jurors' memories, which will inevitably occur, further disadvantages the defendant.

In denying the request for a mistrial, the court stated that the twenty days of trial held prior to the continuance did not constitute a principal part of Briscoe's case:

> I must reject out of hand Dr. Loftus' proposition as applied here. Insofar as to the delay is concerned, it was clearly a gain for the defendant and a loss for the plaintiff.
>
> Up to the Christmas recess the jury could only have had vague and inconclusive notions about the plaintiff's claims. The plaintiff's evidence is too complex and much too technical to have been digested by the jury in the first twenty days.

Although continuing the trial nine additional weeks after the holiday recess to avoid FICA deductions was somewhat unusual, we conclude that the district court did not abuse its discretion. The County has offered no evidence to support the proposition that the jury heard "a major portion of the plaintiff's case" prior to adjournment. This fact was essential to Dr. Loftus' theory.[1] Cases cited by the County dealing with prejudice to plaintiffs from midtrial continuances also are unavailing to indicate that such a delay prejudices defendants. The denial of the motion for a mistrial is affirmed.

C. Time of Completion Warranty Instruction

The County's objection on this issue is twofold. It first submits that the court incorrectly instructed the jury that the

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[1]We express no opinion on the validity of Dr. Loftus' theory.

construction contract "implies a warranty by the County that Briscoe, if it complies with the contract documents, would be able to complete the work within the contemplated period of time." The County also challenges Judge Foley's rejection of a proposed instruction stating that Briscoe, "by submitting its bid and entering into the contract, warrants that it can perform the work in the contemplated period of time and complete the project by the due date."

Jury instructions need not be perfect to withstand challenge on appeal. Our inquiry is whether, considering the charge as a whole, the district court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading. *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1337, *modified*, 773 F.2d 1049 (9th Cir. 1985). In a civil trial, erroneous instructions "need only be more probably than not harmless." *Id.*

The instruction given by the court relates to a duty imposed by law on the owner of a project who provides work instructions and specifications. This implied warranty was established by the Supreme Court in *United States v. Spearin*, 248 U.S. 132 (1918). Plaintiff there sought payment on a contract to build a Navy dry-dock. The project specifications required Spearin to relocate an adjacent sewer, which burst during the construction. The Court found that the government,

> [by] the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance.

Id. at 137 (footnotes omitted).

The wording of the time of completion warranty instruction challenged by the County closely tracks language in two opinions from the former United States Court of Claims construing *Spearin*. *See Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 964 (Ct. Cl. 1965); *Laburnum Constr. Corp. v. United States*, 325 F.2d 451, 457 (Ct. Cl. 1963). Similarly, in *J.D. Hedin Constr. Co. v. United States*, 347 F.2d 235, 241 (Ct. Cl. 1965), the court held that by preparing a project's specifications, the government implicitly warranted "that if the specifications are complied with, satisfactory performance will result." *Cf. American Ship Bldg. Co. v. United States*, 654 F.2d 75, 78-79 (Ct. Cl. 1981) (no time of completion warranty where contractor failed to present any evidence regarding cause of delay).

The County does not question the continuing vitality of the *Spearin* doctrine, but argues that the court in this case imposed an independent warranty of completion by a particular date on the County irrespective of whether it supplied faulty specifications. This is simply incorrect. None of the special interrogatories submitted to the jury can be read to impose liability for work delays absent specific acts or omissions by the County causing the delay. We reject the notion that the County was subjected to "strict liability" for delays in the plant's completion.

The court's instruction correctly stated the law and directly related to an issue in the case. The sixth interrogatory asked the jury whether the County breached the contract by submitting "defective, inadequate and incomplete" contract documents and specifications. The time of completion instruction, requiring Briscoe's compliance with the contract documents, and the instruction which followed, stating that the County warranted that the documents were correct, adequate, and suitable for their

intended purpose, were crucial for the jury to accurately evaluate whether the parties performed their duties under the contract.

The County makes only passing reference to its second claim, that the court should have instructed the jury that Briscoe, by entering into the contract, warranted that it could complete the project within the specified time. Although the County has not argued the merits of this issue, our review of the contract's scheduling provisions indicates that such a reciprocal instruction should have been given. We nevertheless conclude that the court's error was harmless for at least two reasons.

First, an instruction roughly equivalent in substance to the one requested by the County was given by the court: "Briscoe, having undertaken to construct the [plant] . . . is under a duty to the owner by virtue of the relationship created by the general contract to see to it that the job is performed in a workmanlike manner, according to the contract plans and specifications." The contract documents, of course, included deadlines for completion of the project. Second, in its answers to the special interrogatories, the jury determined that the County was responsible for 612 of the 667 days Briscoe was delayed in completing the project. A time of completion warranty by Briscoe would have been excused to the extent the delay was caused by the County. The $275,000 remittitur ordered by the court compensated the County for the additional fifty-five days of delay.

D. Evidence Reference Charts

The County also contends that the district court improperly submitted to the jury unrebutted, argumentative evidence reference charts produced by Briscoe. A decision whether to allow the jury to use charts, indexes, or other visual aids which organize or summarize evidence admitted at trial is reviewed for abuse of discretion. *See Pierce v. Ramsey Winch Co.*, 753

F.2d 416, 431 (5th Cir. 1985). We cannot simply substitute our judgment for that of the district court to reverse under this standard, but must be left with the definite and firm conviction that the court committed a clear error of judgment in reaching its conclusion after weighing the relevant factors. *See Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1337 (9th Cir. 1985).

In light of the length and complexity of this case, the court reasonably was concerned about the jury's ability to organize and analyze the evidence. Judge Foley instructed Briscoe at the close of its case-in-chief to prepare charts of the various breaches of contract underlying the major delay-causing events it claimed were caused by the County. The charts were to designate the witnesses, trial transcript citations, and exhibit numbers supporting each alleged breach, and list the delay-causing event that resulted. The County also was advised to consider preparing charts of its claims and defenses.

Judge Foley anticipated that the charts would assist him in considering directed verdict motions, help the jury during closing arguments, and serve as master topical indexes for the transcripts and exhibits used by the jury during deliberations. Contrary to the court's intentions and instructions, however, neither party submitted its charts until after closing arguments and jury instructions were completed.

Briscoe submitted individual charts corresponding to the ten contract breaches found in the interrogatories and listing consequences allegedly flowing from that breach. The charts served as indexes to binders containing references to trial exhibits and witness testimony. The actual documents and transcripts were contained in separate binders. The County objected to the charts before the jury began deliberations on the grounds that Briscoe had never attempted to tie specific

consequences to particular contract breaches during the trial and that the charts constituted unrebutted argument.

Judge Foley acknowledged that the County's arguments were "probably right," but overruled the objection because he believed that the jury had a strong need for an index of the voluminous trial materials. In denying the County's motion for judgment notwithstanding the verdict or a new trial, the court stated:

> [T]hese charts of Briscoe's did not accomplish what the Court wanted them to do. They did not clearly make the connection between each claimed breach of contract and each delay-causing event. Rather, in a shotgun type approach Briscoe's counsel listed a plethora of consequences flowing from each of the 10 claimed breaches of contract, stating that many of the same consequences flowed from different breaches. . . . [T]he jury was not assisted as the court had hoped and could not have intelligently relied upon the charts at all. It appears obvious the jury drew its own inferences in connecting the breaches of contract with the delay-causing events.

The district court thus concluded that because Briscoe failed to take advantage of this questionable opportunity to clarify its case to the jury, any error committed in submitting the charts to the jury was harmless. We agree.

Ironically, the County's forceful arguments for reversal on this issue actually support Judge Foley's harmless error analysis. The linking of contract breaches and consequences in Briscoe's charts lacked any evidentiary basis. Most of the charts were repetitive and vague. Many were confusing. Others were "absurd." Even assuming that the court abused its discretion in

permitting use of the charts, we are convinced that a reasonable jury simply could not have relied on them in reaching its verdict.

E. Special Interrogatories

Following an eighty-seven day trial which spanned nearly nine months, Judge Foley had a difficult choice in determining how to present the case to the jury in a manner that would ensure a rational verdict based on comprehensive evidence. The court feared that a general verdict, favored by Briscoe, would encourage the jury to speculate. A special verdict proposed by the County, consisting of eight-five detailed interrogatories, threatened confusion and also was rejected.

The court steered between this Scylla and Charybdis by submitting a general verdict and thirteen special interrogatories to the jury pursuant to Fed. R. Civ. P. 49(b). The first ten interrogatories were based on specific allegations of breach in Briscoe's amended complaint.[1] The jury was asked in each instance whether (1) the County breached the contract; (2) delay resulted from the breach; (3) the delay was entirely the County's fault; and (4) the delay prevented Briscoe from performing the contract on time. If the questions were answered "yes," the days of delay attributable to the breach were calculated. The jury also was instructed to render a general verdict of damages to compensate Briscoe for total days of delay found to be caused by the County.

The decision whether to submit a general verdict accompanied by special interrogatories is committed to the discretion of the trial court. Fed. R. Civ. P. 49(b); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1317 (9th Cir.), *cert.*

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[1]Interrogatories 11 and 12 related to the County's counterclaim for liquidated damages. Number 13 requested the jury to determine the date from which Briscoe was entitled to prejudgment interest.

denied, 459 U.S. 859 (1982). The County does not challenge the use of interrogatories in this case or claim that the jury's answers were inconsistent with each other or with the general verdict. It insists, however, that the interrogatories were duplicative and overlapping and resulted in an excessive award of damages to Briscoe.

The district court has broad discretion in determining the precise wording of the interrogatories as long as the issues are fairly presented. *Carvalho v. Raybestos-Manhattan, Inc.*, 794 F.2d 454, 455 (9th Cir. 1986). A court nevertheless may abuse its discretion by submitting special interrogatories that are likely to mislead or confuse the jury or inaccurately state the issues. *See Cann v. Ford Motor Co.*, 658 F.2d 54, 58 (2d Cir. 1981), *cert. denied*, 456 U.S. 960 (1982).

The County argues that by characterizing some of the contract breaches in broad and vague terms, the court confused the jury and allowed it to count the same days of delay more than once. For example, in response to the first interrogatory, titled "Termination of NECON," the jury found that completion of the plant was delayed fifteen days because the successor engineers "were deprived of access to NECON's design and other calculations, drafts and preliminary designs." Under the second interrogatory, "Engineering Services," the jury determined that the County was responsible for fifteen days of delay for failing and refusing "to provide essential engineering services during construction." According to the County, the first interrogatory is simply a subset of the second.

Similar criticism is directed toward the eighth and tenth interrogatories. Number eight, titled "Disruption of Scheduling," asked the jury whether the County "delayed, disrupted and interfered with the performance of work." Number ten, "Interference with Work," described an alleged breach as follows: "Briscoe claims that in addition to interfering

with scheduling, the County unreasonably interfered with the performance of its work." The jury found 100 days of delay under the eighth interrogatory and 115 under the tenth.

We recognize, as Judge Foley did, that some of the interrogatories were poorly drafted and were susceptible of misconstruction and overlap. We conclude, however, that a reasonable jury would not have been misled. Absent some evidence to the contrary, we much assume that the jury properly discharged its duties and followed the district court's instructions to consider the interrogatories "one by one, one at a time" and to determine "the number of days delay that flows from the particular breach of contract." *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933); *Cf. Cann*, 658 F.2d at 59.

A reasonable jury could distinguish between delays resulting from the lack of access to NECON's designs and calculations and from the failure to provide other essential engineering services during construction. Likewise, although interrogatories eight and ten are similar, the title of number eight refers to the disruption of scheduling and the text of number ten excludes delays related to scheduling.

Finally, we conclude that the jury's original damages award of $16.24 million, based on the total days of delay found to be attributable to the County's breaches of contract, is supported by substantial evidence. The award, while large, was less than the uncontroverted out-of-pocket loss sustained by Briscoe during construction of the plant. When the jury is properly instructed and presented with substantial evidence, its verdict must stand. *See Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1014 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). Any error in instructing the jury regarding the County's counterclaim was remedied by Briscoe's acceptance of the remittitur.

CONCLUSION

Briscoe's counterclaims in reply for damages were compulsory to the County's breach of contract counterclaim. We believe that the Supreme Court of Nevada would conclude that the state's notice-of-claim statute is waived in such cases. Briscoe's suit therefore was not barred.

[3] We also hold that the district court did not abuse its discretion by granting a continuance during the trial, that the jury was adequately instructed regarding contract warranties, and that it is more likely than not that the special interrogatories submitted did not confuse the jury. Finally, any error resulting from the court's use of evidence reference charts was harmless.

The district court's judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil-S-80-135-RDF

FRANK BRISCOE COMPANY, INC.,
Plaintiff,

v.

COUNTY OF CLARK
Defendant.

AMENDED FINAL JUDGMENT

Filed May 26, 1987

This action having been tried to a jury, Honorable Roger D. Foley, District Judge, presiding, and the Court having directed the jury to find general verdicts and also to answer certain written interrogatories, and the jury having rendered a general verdict for plaintiff upon plaintiff's breach of contract claims and a general verdict for the plaintiff and against the defendant upon defendant's counterclaim, and having answered the said interrogatories, and, the Court by order of May 6, 1987 having denied the County's Motion for New Trial upon the condition that Briscoe remit the sum of $275,000.00, an amount the Court ruled the jury could have awarded the County upon its counterclaim, and Briscoe having filed its remittitur of $275,000.00 on May 18, 1987,

IT IS ORDERED AND ADJUDGED that an amended judgment is now entered in favor of the plaintiff, FRANK BRISCOE COMPANY, and against the defendant, COUNTY

OF CLARK, in the amount of $15,965,000.00 (the amount of the verdict for Briscoe of $16,240,000.00 less the remitted amount of $275,000.00).

IT IS FURTHER ORDERED that the plaintiff is awarded prejudgment interest against the defendant at the rate of 12% per annum from May 5, 1982 until the date of entry of the original judgment entered on September 16, 1986 in the amount of $8,371,783.55.

IT IS FURTHER ORDERED that post judgment interest shall accrue on this judgment, entered on September 16, 1986, in the total amount of $24,336,783.55, in accordance with Section 1961, Title 28, United States Code, at the rate of 5.63% per annum.

IT IS FURTHER ORDERED that plaintiff is awarded costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure and Rule 205 of the Rules of Practice of the United States District Court for the District of Nevada.

DATED: May 26, 1987.

_____
Deputy Clerk

_____
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil LV 80-135 RDF

FRANK BRISCOE COMPANY, INC.,
Plaintiff,

v.

COUNTY OF CLARK
a political subdivision of the State of Nevada, et al.,
Defendant.

FINAL JUDGMENT

Filed September 16, 1986

This action having been tried to a jury, Honorable Roger D. Foley, District Judge, presiding, and the Court having directed the jury to find general verdicts and also to answer certain written interrogatories, and the jury having rendered a general verdict for plaintiff upon plaintiff's breach of contract claims and a general verdict for the plaintiff and against the defendant upon the defendant's counterclaims, and having answered the said interrogatories,

IT IS ORDERED AND ADJUDGED that JUDGMENT is entered in favor of the plaintiff Frank Briscoe Company, Inc., against the defendant County of Clark in the amount of $16,240,000.

IT IS FURTHER ORDERED that the plaintiff is awarded prejudgment interest against the defendant County of Clark at the

rate of 12% per annum from May 5, 1982 until the date of the entry of this judgment, in the amount of $8,532,006.58.

IT IS FURTHER ORDERED that post judgment interest shall accrue on this judgment, entered this date, in the total amount of $24,772,006.58, in accordance with Section 1961, Title 28, United States Code, at the rate of 5.63% per annum.

IT IS FURTHER ORDERED that defendant County of Clark recover nothing on its counterclaims, which counterclaims are dismissed on the merits with prejudice.

IT IS FURTHER ORDERED that plaintiff is awarded costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure and Rule 205 of the Rules of Practice of the United States District Court for the District of Nevada.

DATED: September 16, 1986.

_____
Clerk

_____
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil LV-80-135 RDF

FRANK BRISCOE COMPANY, INC.,
a corporation,
Plaintiff,

v.

THE COUNTY OF CLARK
Defendant.

ORDER DENYING COUNTY'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

Entered May 6, 1987

THE COUNTY'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The County has moved for judgment n.o.v. on grounds that Briscoe failed to comply with the contracts notice provisions. There were controverted issues of fact relative to compliance with the contracts notice provisions. These were submitted to the jury under appropriate instructions which the Court finds to be correct as a matter of law. This motion is denied.

The County has moved for judgment n.o.v. on the grounds that Briscoe and the County reached an accord and satisfaction as to several Briscoe claims. The County contends that the resolution of disputes through change orders and through arbitration represented an accord and satisfaction and bar

Briscoe's claims for delay damages as to the subject matter agreed to in the change orders and as to arbitration awards.

Both parties asked this Court to direct a verdict in its favor on the accord and satisfaction issue. The Court did neither and submitted the accord and satisfaction issue to the jury under appropriate instructions.

The Court finds again that the language of the change orders was not clear as to the effect of the change orders upon Briscoe's delay to completion claims. The jury had the choice to decide whether or not there was accord and satisfaction and obviously decided there was not.

As to arbitration proceedings, although begun, they were later abandoned. This motion is denied.

The County moves for judgment n.o.v. on the grounds that Briscoe is barred from seeking extra contractual damages. The County's argument is that Briscoe cannot claim such damages for delay caused by the owner under the terms of the contract. (See Briscoe's Damages Summary, Exhibit 10254, Schedules C through J). This is simply not so. In addition to the General Conditions Nos. 704 and 705 that the County cites, there is General Condition No. 713 under which the jury could allow such damages for delay. The jury's finding for damages for delay was in accordance with the instructions and substantial evidence before the jury. This motion is denied.

The County moves for judgment n.o.v. upon the grounds that Briscoe failed to exhaust administrative remedies for resolution of changes to the contract and thus Briscoe's claims sued upon are barred. The County alleges that in addition to giving timely written notice of claim arising out of changes to the terms of the contract, Briscoe must, as a condition precedent to suit, supplement such notices with specific costs and scheduling

information and, having failed to do so, cannot pursue damage claims set forth in Schedules C through J of Exhibit 10254. All issues of compliance by either party, or by both of the parties, with the terms and conditions of the contract were before the jury under appropriate instructions. There were no spelled out administrative procedures in the contract that could be said to be conditions precedent to suit. This motion is denied.

THE COUNTY'S MOTIONS FOR NEW TRIAL

The County moves for a new trial upon the grounds that the verdict awarding Briscoe $16,240,000 damages for breach of contract was excessive, unreasonable and unsupported by the clear weight of the evidence. There is substantial evidence from which the jury could have awarded $21,074,000 damages to Briscoe for 667 days of delay caused by the County, rather than $16,240,000 for 612 days of delay caused by the County, that the jury did in fact award. The motion is denied.

The County moves for a new trial on the grounds that flaws in the trial and deliberation process resulted in a miscarriage of justice.

The Special Interrogatories in General

Because of the complexity and technical nature of this case and the anticipated length of the trial, from the beginning the Court repeatedly encouraged the jury to listen attentively to the testimony as it came in and to try to understand it; to discipline themselves to not lose heart or patience; to not woolgather; to not attempt, until later in the trial, to relate one bit of evidence to another lest they not understand what was being said by witnesses then and now. The Court was afraid that the jury become hopelessly lost in the maze of voluminous and technical evidence. The trial transcript runs 15,677 pages. There were 1529 exhibits received from Briscoe. There were 709 exhibits

received from the County. The Court kept telling the jury not to be overwhelmed; not to throw in the towel; that in time the pieces would fall into place, that a mosaic would appear; and that a way would be found by the Court and counsel to enable the jury to bring their rational minds to bear upon the pertinent evidence, that they would understand and relate one piece to another, and thus reach a reasonable and just verdict, rather than reach a verdict by guess work. The jury were several times admonished that a verdict reached by speculation would be a grave miscarriage of justice.

As the trial progressed, the Court kept casting about for the best means of presenting the case to the jury in order for them to reach a rational verdict upon comprehensible evidence. From the beginning, the Court was certain that general verdicts would be inappropriate in this case because they could encourage the jury to speculate. Special interrogatories were in order so that the jury would focus one at a time upon the essential issues before them for trial and upon the evidence pertinent to those issues. The County favored special interrogatories and filed, on the 14th day of July, 1986, some 85 interrogatories, 56 of which related to field orders and 29 to delay claims. Since the Court had throughout the trial stressed the need for clarity and simplicity in order that the jury not get hopelessly lost, with the result being likely that they would speculate, the County's 85 interrogatories appeared to be a veritable maze that the jury could not be expected to find their way through in a rational manner. Briscoe made no request for special interrogatories.

Briscoe's proof came in the form of some 29-odd claims for delay to completion of the work allegedly caused by the County, through no fault of Briscoe. Briscoe's evidence was that each of these delay claims caused Briscoe delay in completing the work, but not every delay in itself effected the completion date, that is, "drove the end date" (Walter Wachter's term), because of the interrelationship of the delays with each other and with other

events. Briscoe itemized or specified its damages with as much particularity as reasonably possible. The County complains that Briscoe did not assign *each* breach or impact a specific number of days of delay or a specific dollar amount for lost productivity. Briscoe's evidence makes plain that it was not possible to do that. In this regard Walter Wachter's testimony is important:

> A. (By Mr. Wachter) It's very important to recognize, however, that in my analysis or any other analysis prepared by an expert it is virtually impossible to give to you a detailed listing of number of days of delay for each delay-causing event on the project. It is particularly the case on this project because there are so many what I call critical paths of construction and subcritical paths that the number of combinations that exist after you make a decision as to what events Briscoe is entitled to and what events Briscoe is not entitled to, your decision on those events can be material in the decision as to how many days of delay Briscoe is entitled to.
>
> And the number of combinations that are possible for you to render a decision for yes or no relates to literally hundreds of different combinations of number of days of delay or amount of dollars due to losses of productivity. In fact, when you get to the areas of loss of productivity, you find that it is virtually impossible, except in some very limited cases to extract out a particular event from the productivity analysis and put a dollar of cost on it. And that's because the events are occurring at the same time in the field.
>
> * * *
>
> So what I'm saying is is that in a lot of cases you don't have this problem, but in this case, because of the,

> number one, the magnitude of the delays, number two, the far-reaching effect of those delays, *it is virtually impossible to connect any particular delay or delay-causing event to an appropriate loss of productivity and an appropriate delay damage.* (emphasis added)

(Tr. p. 13,951 to p. 13953)

After first considering presenting the case to the jury in the form of interrogatories relative to the 29-odd claims for delay, the Court realized that because of the interrelationship of the delay claims not just among themselves, but also with events other than claims for delay, basing interrogatories upon claims for delay would be impracticable and confusing. The Court then decided to present the case to the jury in the form of interrogatories relating to Briscoe's *breach of contract* and *breach of implied warranty* claims that Briscoe contended *caused* the 29-odd days of delay to completion.

In the pretrial order, Briscoe listed 45 separate and distinct breaches of contract and breaches of implied warranty claims. (Hereinafter all are called breaches of contract.) The amended complaint of April 2, 1984, contained approximately 27 breaches of contract claims sounding both in contract and in tort.

After deciding motions for directed verdicts (see Vol. 78 Tr., p. 14295 to p. 14302), there remained for the jury to determine just 13 issues and the Court set out each of these in 13 separate interrogatories: the first 10 interrogatories, for breach of contract claims; the next 2 interrogatories, Nos. 11 and 12, for the defendants' counterclaims; and the last interrogatory, No. 13, for prejudgment interest.

The preamble to Interrogatories Nos. 1 to 10 inclusive was taken from specific allegations of breach of contract in COUNT

THREE, paragraph 23, of the amended complaint, filed April 2, 1984, as follows:

Interrogatory No.	Para. No.	
1	23a & b	Termination of NECON
2	23c	Engineering services
3	23d & e	Segmentation
4	23f	Segmentation-scheduling
5	23g & h	Pre-bid submittals
6	23i	Defective plans
7	23j	Processing of change orders
8	23k	Disruption of scheduling
9	23n	Shop drawing approval
10	23s	Interference with work

There was nothing one-sided or improper in phrasing the preface of each interrogatory in the terms of the claimed breaches of contract. It is to be noted that the County objects only to the preface and raises no objection to the language of the five questions that the jury was required to answer in each of the 10 interrogatories. All of the breaches claimed by Briscoe that had not been taken out of the case by directed verdict or otherwise were dealt with in the first 10 interrogatories.

There is no merit in the County's argument, that since Briscoe's evidence and the County's evidence by way of defense were introduced in the terms of 29-odd delay claims, it was error for the Court to submit the case to the jury by interrogatories dealing with breach of contract claims. The claims for trial were the breach of contract claims. The delay-causing events were the evidence that supported the breach of contract claims. This Court is satisfied that submitting the case to the jury as was done, was the only appropriate way to assist

them as much as possible in returning rational verdicts free of speculation.

Further, there is not merit at all in the County's claims that the interrogatories were not supported by substantial evidence.

Special Interrogatories Nos. 8 and 10

The County argues that Special Interrogatories Nos. 8 and 10 are duplicative and overlapping. The jury found 100 days of delay in Interrogatory No. 8, and 115 days of delay in Interrogatory No. 10. The Court had decided to divide the claims for delay, because of the County's interference with Briscoe's work, into two interrogatories: one, Interrogatory No. 8, for delay caused by the *disruption of scheduling*; and the other, Interrogatory No. 10, for delay caused by all *other types of work interference*. Although the preface to Interrogatories 8 and 10 were poorly drafted, the Court is satisfied that the jury understood the distinction that the Court had intended to make. Therefore, there is no merit in the County's claim that Interrogatories 8 and 10 were duplicative and overlapping. The motion is denied.

Special Interrogatories Nos. 1 and 2

As to Interrogatories Nos. 1 and 2, the motion for new trial is denied. These two interrogatories are not duplicative or overlapping.

Objections to Charts

The County knew as early as July 21, 1986, that Briscoe had been directed by the Court to submit charts to be used during argument on motions for directed verdicts and on final summation, *charts which made the connection between the claimed breaches of contract and the consequences of the same,*

i.e., delay-causing events. The County also knew at that time that it was directed to submit charts that appropriately responded to Briscoe's charts.

No such charts were submitted by either side at the time the Court heard arguments on motions for directed verdict, nor by the time counsel made their closing arguments to the jury. After closing arguments and after the Court instructed the jury, Briscoe submitted the certain charts, copies of which are attached hereto as Exhibits 1-10, inclusive. On August 7, 1986, after instructions but before the jury retired to deliberate, but out of their presence, the County for the first time argued that Briscoe's charts were argumentative and that the County had no opportunity to argue against the same.

By August 7, 1986, the Court had directed that Briscoe's charts be placed in the front of each of the first 10 of 14 books of reference to the transcript and exhibits that Briscoe had prepared for the jury's use during deliberation, and had directed that the charts of the County be placed in the front of the first 7 books of reference to the transcript and exhibits that the County had prepared.

At the urging of the Court, much effort of counsel went into the preparation of some 14 volumes for Briscoe and 7 volumes for the County containing references to particular portions of the transcript and to documents in evidence that counsel wished to call the jury's attention to during deliberations. These volumes were appropriately indexed and referenced. There was no objection to the contents of these 21 volumes, only to the one or two page charts in the front of volumes 1 to 10, inclusive (Exhibits 1-10, inclusive, hereof), that associated or connected each of the 10 breaches of contract and the consequence of the same, with the delay-causing events.

While the Court agreed with the County that Briscoe's charts contained argument that the County had not had an opportunity to rebut, it overruled the objection and let the Briscoe charts go to the jury to help them make the essential connection between each of the 10 breaches of contract, and the consequences of such breaches of contract, with the delay-causing events. The Court was aware that no Briscoe witnesses had directly tied the 10 breaches of contract to specific delay-causing events which were the consequences of the breaches of contract, that the jury was left to draw inferences regarding the same.

Much discussion took place and little more need be said. To have a clear picture of the matter, see:

1. Pages 8394 to 8405, Vol. 44 of Transcript;
2. Pages 10374 and 10375, Vol. 55 of Transcript;
3. Pages 14286 to 14292, Vol. 77 of Transcript;
4. Pages 15371 and 15372, Vol. 84-I of Transcript;
5. Pages 15380-15385, Vol. 84-II of Transcript;
6. Pages 15626 through 15646, Vol. 86 of Transcript;
7. Transcript of arguments on "Defendant's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial or Remittitur as to Damages", beginning with pages 43 to 48 and pages 184 to 190.

After carefully reviewing the matter, the Court is convinced that if there was any error it was in the technical sense, i.e., one side's argument went to the jury unrebutted by the other side because the other was given no opportunity to rebut, yet such error was harmless beyond any doubt when considered in the contents of the entire case. Furthermore, these charts of Briscoe's did not accomplish what the Court wanted them to do. They did not clearly make the connection between each claimed breach of contract and each delay-causing event. Rather, in a shotgun type approach Briscoe's counsel listed a plethora of consequences flowing from each of the 10 claimed breaches of

contract, stating that many of the same consequences flowed from different breaches of contract. In a word, the jury was not assisted as the Court had hoped and could not have intelligently relied upon the charts at all. It appears obvious that the jury drew its own inferences in connecting the breaches of contract with the delaying-causing events. The motion for a new trial relative to the charts is denied.

Prejudgment Interest

The jury was directed to fix the date from which prejudgment interest at 12% per annum would begin to run. They were told that if they found that Briscoe was entitled to recover damages for the County's breach of contract, prejudgment interest would run from the date of breach of contract. The jury, in Interrogatory No. 13, per instructions of the Court, fixed May 5, 1982, as the date from which prejudgment of 12% per annum would begin to run. Although it is unknown why the jury chose that date, the Court notes that the actual final completion date of the project was April 27, 1982, just five days before May 5, 1982. The Court will not disturb what the jury did here. Under the evidence they could have run interest from an earlier date.

The County's Counterclaim

The County sought by way of counterclaim liquidated damages in the amount of $5,000 per day for each day that substantial completion was delayed through fault of Briscoe, and $1,000 per day for each day final completion was delayed through fault of Briscoe.

By their answers to the first ten special interrogatories the jury found that 612 days' delay out of a total of 667 days of delay were caused by the County's breaches of contract. The jury could have found, had it been asked to do so, and they were

not, that the balance of the 55 days' delay were either the fault of neither party or the fault of Briscoe.

In Interrogatories Nos. 11 and 12, the jury found against the County as to its counterclaims, that is, the jury found that Briscoe had not breached the contract in failing to achieve substantial and final completion timely. Ordinarily, such findings would foreclose a post trial argument that the County was entitled to liquidated damages. However, it is now clear that Instruction No. 85 was given in error. That instruction is as follows:

> If by your answers to Interrogatories Questions 1 to 10, inclusive, you have not determined any number of days that Briscoe was delayed in the completion of the construction contract as the result of the County's breaches of contract, that is, if you have not inserted any number of days of delay in answering Question No. 5 of Interrogatories, then and only then and not otherwise you should consider the County's counterclaim against Briscoe.

The County had the right to have its counterclaim considered by the jury even though they may have answered Question No. 5 of the first 10 interrogatories favorable to Briscoe. The Court must now give the County the benefit of the doubt that the jury may have found, as they did in Interrogatories Nos. 11 and 12 because of erroneous Instruction No. 85.

At page 7046, witness Walter Wachter testified that all of the 667 days' delay occurred between the originally scheduled substantial completion date of March 31, 1980, and the actual substantial completion date of January 27, 1982. So, had it not been for the Court's error in Instruction No. 85, the jury may have awarded liquidated damages to the County for the aforesaid 55 days. The giving of Instruction No. 85, when considered in

the context of the entire case, does not warrant the granting of a new trial, even though the County may have been deprived of an award of liquidated damages on its counterclaim. Therefore, in order to compensate for the result of erroneous instruction, the Court will remit the dollar value of the 55 days at $5,000 per day, or $275,000.

Nevada Presentment of Claims Statute

Having reviewed the matter carefully, the Court is satisfied that it appropriately dealt with this problem. See the Court's Decision and Order on Motions, pp. 13-20, filed March 3, 1986, and discussion on the motion for directed verdict, page 14299 et seq., Vol. 78.

The Continuance of Trial from January 6, 1986, to March 11, 1986

The Court dealt fully with this matter in its ORDER DENYING MOTION FOR MISTRIAL, filed August 11, 1986.

Finally, the County argues as grounds for new trial the following.

The Court incorrectly instructed the jury as to the implied warranty as to the contract time of performance;

The Court incorrectly admitted parol evidence to alter change orders;

Briscoe's improper appeal to the emotions of the jury for sympathy was prejudicial to the County;

The Court should grant a new trial because the jury was prevented from considering the effects of the statute of limitations on Briscoe's claims.

There is no merit to any of these claims. The Court has again carefully considered these arguments and believes its rulings in the record are correct and warrant no further discussion.

REMITTITUR

The denial of the County's motion for judgment n.o.v. and for new trial is made upon the condition that Briscoe file a remittitur of damages on the judgment as follows:

The County's Counterclaim.

Briscoe is to remit $275,000, that is, 55 days at $5,000 per day.

Briscoe shall file an acceptance and approval of the remittitur of $275,000 within 20 days of this date.

DATED: May 6, 1987.

Clerk

U.S. District Judge

EXHIBIT 1

TERMINATION OF NECON

Briscoe contends that the County's termination of Necon has resulted in the following consequences to Briscoe:

A. Chemical Feed Building Slab-on-Grade Design Changes

B. Solids Processing Building-Pilaster Design Changes

C. Owners Interpretation of Contract Requirement of 7-14 Day Concrete Placement Restraints

D. Owners Interpretation of the Application of the Water Tightness Test Requirements

E. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footing

F. Design Changes to Solids Processing Building (FD-25)

G. Delayed Shop Drawing Approval for Lime Slakers

H. Delayed Shop Drawing Approval for Filter Presses

I. Delay to Engineers Approval of a Substitute Cement During the Cement Shortage

J. Delayed Shop Drawing Approval of Plunger Pumps

K. Differing Site Conditions - Post Aeration Basins

L. Improper Segmentation of the Project

M. Cement Mortar Lined Pipe Welding Dispute

N. Delayed Shop Drawing Approval of Variable Frequency Drives

O. Delayed Shop Drawing Approval of SCP-2A

P. Design Changes to SCP-1

Q. Additional Thrust Ties - Low Pressure Pump Station

R. Backwash Line Failure

S. Engineers Requirement to Modify Manual Values to Automatic Valves at Filter Presses

T. Additional Requirements for Ducon Pneumatic Air System

U. Intersegment Restraints - Field Acceptance Testing

V. Owners Definition of Substantial Completion

W. Concrete Finishing Dispute

X. Electrical and Instrumentation Coordination

Y. Termination of Necon

Z. Dispute over HVAC Control Wiring

AA. Open Field Orders

BB. Failure to Properly and Timely Process Change Order Proposals

CC. Prebid Submittals - General

DD. Shop Drawing Review

EE. Damages

EXHIBIT 2

FAILURE AND REFUSAL TO PROVIDE ESSENTIAL ENGINEERING SERVICES

Briscoe contends that the County's failure and refusal to provide essential engineering services has resulted in the following consequences to Briscoe:

A. Soil Salts Test Procedure Dispute

B. Chemical Feed Bldg. Slab-on-Grade Design Changes

C. Solids Processing Building - Pilaster Design Changes

D. Owners Interpretation of Contract Requirement for 7-14 Day Concrete Placement Restraints

E. Owners Interpretation of the Application of the Water Tightness Test Requirements

F. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footings

G. Design Changes to Solids Processing Building FD-25

H. Delayed Shop Drawing Approval for Lime Slakers

I. Delayed Shop Drawing Approval for Filter Presses

J. Delay to Engineers Approval of a Substitute Cement During the Cement Shortage

K. Delayed Shop Drawing Approval of Plunger Pumps

L. Improper Segmentation of the Project

M. Cement Mortar Lined Pipe Welding Dispute

N. Delayed Shop Drawing Approval of Variable Frequency Drives

O. Delayed Shop Drawing Approval of Panel SCP-2A

P. Design Changes to SCP-1

Q. Additional Thrust Ties - Low Pressure Pump Station

R. Backwash Line Failure

S. Engineers Requirement to Modify Manual Values to Automatic Valves at Filter Presses

T. Additional Requirements for Ducon Pneumatic Air System

U. Intersegment Restraints - Field Acceptance Testing

V. Owner's Definition of Substantial Completion

W. Concrete Finishing Dispute

X. Electrical and Instrumentation Coordination

Y. Termination of Necon

Z. Dispute over HVAC Control Wiring

AA. Open Field Order

BB. Prebid Submittals

CC. Shop Drawing Review

DD. Damages

EXHIBIT 3

SEGMENTATION MADE IT IMPOSSIBLE OR IMPRACTICAL TO COMPLETE THE PROJECT IN 1200 DAYS AND ALLOWED TIME EXTENSIONS

Briscoe contends that the County's Segmentation of the project rendered it impossible or impractical to complete the project in 1200 days (and allowed time extensions) resulting in the following consequences to Briscoe:

A. Segment 2 Notice to Proceed Delay

B. Owners Interpretation of Contract Requirement for 7-14 Day Concrete Placement Restraints

C. Owners Interpretation of the Application of the Water Tightness Test Requirements

D. Improper Segmentation of the Project

E. Intersegment Restraints - Field Acceptance Testing

F. Termination of Necon

G. Damages

EXHIBIT 4

SEGMENTATION MADE IT IMPOSSIBLE OR IMPRACTICAL TO SATISFY SCHEDULING REQUIREMENTS OF THE PROJECT

Briscoe contends that the County's Segmentation of the project made it impossible or impractical to satisfy the scheduling of the project, resulting in the following consequences to Briscoe:

A. Segment 2 Notice to Proceed Delay

B. Owners Interpretation of Contract Requirement for 7-14 Day Concrete Placement Restraints

C. Owners Interpretation of the Application of the Water Tightness Test Requirements

D. Improper Segmentation of the Project

E. Intersegment Restraints - Field Acceptance Testing

F. Damages

EXHIBIT 5

IMPROPER REVIEW, APPROVAL, SUBSEQUENT DESIGN AND ENGINEERING TO ACCOMMODATE PRE-BID SUBMITTALS

Briscoe contends the County's representative, Necon, failed to review the pre-bid submittal packages for the furnishing of major equipment and failed to perform the design work and the engineering necessary to change or modify the original plans and specifications as necessary to accommodate the pre-bid submittal equipment that Necon had approved and upon which Briscoe based its bid, resulting in the following consequences to Briscoe:

A. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footings

B. Delayed Shop Drawing Approval for Lime Slakers

C. Delayed Shop Drawing Approval for Filter Presses

D. Delayed Shop Drawing Approval of Plunger Pumps

E. Delayed Shop Drawing Approval of Panel SCP-2A

F. Engineers Requirement to Modify Manual Valves to Automatic Valves at Filter Presses

G. Additional Requirements for Ducon Pneumatic Air System

H. Termination of Necon

I. Prebid Submittals

J. Damages

EXHIBIT 6

DEFECTIVE, INADEQUATE, INCOMPLETE PLANS AND SPECIFICATIONS

Briscoe contends that the plans and specifications for the construction of the Clark County AWT Plant, are defective, inadequate and incomplete, resulting in Briscoe's inability to complete performance of the construction contract on time, which resulted in the following consequences to Briscoe:

A. Soil Salts Test Procedure Dispute

B. Chemical Feed Bldg. Slab-on-Grade Design Changes

C. Solids Processing Building - Pilaster Design Changes

D. Owners Interpretation of Contract Requirement of 7-14 Day Concrete Placement Restraints

E. Owners Interpretation of the Application of the Water Tightness Test Requirements

F. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footings

G. Design Changes to Solids Processing Building FD-25

H. Delayed Shop Drawing Approval for Lime Slakers

I. Delayed Shop Drawing Approval of Plunger Pumps

J. Differing Site Conditions - Post Aeration Basins

K. Improper Segmentation of the Project

L. Cement Mortar Lined Pipe Welding Dispute

M. Delayed Shop Drawing Approval of Variable Frequency Drives

N. Delayed Shop Drawing Approval of Panel SCP-2A

O. Design Changes to SCP-1

P. Additional Thrust Ties - Low Pressure Pump Station

Q. Backwash Line Failure

R. Engineers Requirement to Modify Manual Valves to Automatic Valves at Filter Presses

S. Additional Requirements for Ducon Pneumatic Air System

T. Intersegment Restraints - Field Acceptance Testing

U. Owner's Definition of Substantial Completion

V. Concrete Finishing Dispute

W. Electrical and Instrumentation Coordination

X. Dispute over HVAC Control Wiring

Y. Open Field Orders

Z. Failure to Properly and Timely Process Change Order Proposals

AA. Prebid Submittals

BB. Damages

EXHIBIT 7

FAILURE TO TIMELY PROCESS CHANGE ORDER PROPOSALS

Briscoe contends they were unable to complete performance of the construction contract on time due to the County's failure to process change orders in a prompt and timely manner, resulting in the following consequences to Briscoe:

A. Segment 2 Notice to Proceed Delay

B. Chemical Feed Bldg. Slab-on-Grade Design Changes

C. Solids Processing Building - Pilaster Design Changes

D. Design Changes to Solids Processing Building FD-25

E. Delays to Engineers Approval of a Substitute Cement During the Cement Shortage

F. Delayed Shop Drawing Approval of Plunger Pumps

G. Differing Site Conditions - Post Aeration Basins

H. Teamster Strike

I. Improper Segmentation of the Project

J. Cement Mortar Lined Pipe Welding Dispute

K. Delayed Shop Drawing Approval of Variable Frequency Drives

L. Delayed Shop Drawing Approval of Panel SCP-2A

M. Design Changes to SCP-1

N. Additional Thrust Ties - Low Pressure Pump Station

O. Pipefitter Strike

P. Backwash Line Failure

Q. Engineers Requirement to Modify Manual Valves to Automatic Valves at Filter Presses

R. Additional Requirements for Ducon Pneumatic Air System

S. Owner's Definition of Substantial Completion

T. Electrical and Instrumentation Coordination

U. Dispute over HVAC Control Wiring

V. Open Field Orders

W. Failure to Properly and Timely Process Change Order Proposals

X. Damages

EXHIBIT 8

DISRUPTION OF SCHEDULING

Briscoe contends they were unable to complete the construction contract on time due to the County's disruption and interference with the performance of their work, resulting in the following consequences to Briscoe:

A. Segment 2 Notice to Proceed Delay

B. Soil Salts Test Procedure Dispute

C. Chemical Feed Bldg. Slab-on-Grade Design Changes

D. Solids Processing Building - Pilaster Design Changes

E. Owners Interpretation of Contract Requirement of 7-14 Day Concrete Placement Restraints

F. Owners Interpretation of the Application of the Water Tightness Test Requirements

G. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footings

H. Design Changes to Solids Processing Building FD-25

I. Delayed Shop Drawing Approval for Lime Slakers

J. Delayed Shop Drawing Approval for Filter Presses

K. Delay to Engineers Approval of a Substitute Cement During the Cement Shortage

L. Delayed Shop Drawing Approval of Plunger Pumps

M. Differing Site Conditions - Post Aeration Basins

N. Teamster Strike

O. Improper Segmentation of the Project

P. Cement Mortar Lined Pipe Welding Dispute

Q. Delayed Shop Drawing Approval of Variable Frequency Drives

R. Delayed Shop Drawing Approval of Panel SCP-2A

S. Design Changes to SCP-1

T. Additional Thrust Ties - Low Pressure Pump Station

U. Pipefitter Strike

V. Backwash Line Failure

W. Engineers Requirement to Modify Manual Valves to Automatic Valves at Filter Presses

X. Additional Requirements for Ducon Pneumatic Air System

Y. Intersegment Restraints - Field Acceptance Testing

Z. Owner's Definition of Substantial Completion

AA. Concrete Finishing Dispute

BB. Electrical and Instrumentation Coordination

CC. Termination of Necon

DD. Dispute over HVAC Control Wiring

EE. Open Field Orders

FF. Failure to Properly and Timely Process Change Order Proposals

GG. Prebid Submittals

HH. Damages

EXHIBIT 9 –

FAILURE TO TIMELY APPROVE SHOP DRAWINGS

Briscoe contends that they were unable to complete the construction contract on time due to the County's failure to approve Shop Drawings in a timely manner, resulting in the following consequences to Briscoe:

A. Delayed Shop Drawing Approval for Lime Slakers

B. Delayed Shop Drawing Approval for Filter Presses

C. Delays to Engineers Approval of a Substitute Cement During the Cement Shortage

D. Delayed Shop Drawing Approval of Plunger Pumps

E. Delayed Shop Drawing Approval of Variable Frequency Drives

F. Delayed Shop Drawing Approval of Panel SCP-2A

G. Prebid Submittals

H. Shop Drawing Review

I. Damages

EXHIBIT 10

UNREASONABLE INTERFERENCE WITH THE PERFORMANCE OF WORK

Briscoe contends that they were unable to complete the construction contract on time due to the County's unreasonable interference with the performance of Briscoe's work, resulting in the following consequences to Briscoe:

A. Segment 2 Notice to Proceed Delay

B. Soil Salts Test Procedure Dispute

C. Chemical Feed Bldg. Slab-on-Grade Design Changes

D. Solids Processing Building - Pilaster Design Changes

E. Owners Interpretation of Contract Requirement for 7-14 Day Concrete Placement Restraints

F. Owners Interpretation of the Application of the Water Tightness Test Requirements

G. Delay in Decision by the Owner to Locate and Size the Solids Processing Building Filter Press Footings

H. Design Changes to Solids Processing Building FD-25

I. Delayed Shop Drawing Approval for Lime Slakers

J. Delayed Shop Drawing Approval for Filter Presses

K. Delay to Engineers Approval of a Substitute Cement During the Cement Shortage

L. Delayed Shop Drawing Approval of Plunger Pumps

M. Differing Site Conditions - Post Aeration Basins

N. Teamster Strike

O. Improper Segmentation of the Project

P. Cement Mortar Lined Pipe Welding Dispute

Q. Delayed Shop Drawing Approval of Variable Frequency Drives

R. Delayed Shop Drawing Approval of Panel SCP-2A

S. Design Changes to SCP-1

T. Additional Thrust Ties - Low Pressure Pump Station

U. Pipefitter Strike

V. Backwash Line Failure

W. Engineers Requirement to Modify Manual Valves to Automatic Valves at Filter Presses

X. Additional Requirements for Ducon Pneumatic Air System

Y. Prebid Submittals

Z. Intersegment Restraints - Field Acceptance Testing

AA. Owner's Definition of Substantial Completion

BB. Concrete Finishing Dispute

CC. Electrical and Instrumentation Coordination

DD. Dispute over HVAC Control Wiring

EE. Open Field Orders

FF. Shop Drawing Review

GG. Damages

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Case No. CV-LV-80-135 RDF

FRANK BRISCOE COMPANY, INC.,
a corporation,
Plaintiff,

vs.

THE COUNTY OF CLARK, et al.,
Defendants.

Transcript of
Oral Ruling
on
Motions for Directed Verdict

Taken on Monday, July 21, 1986

THE CLERK: This is the time set for the continuation of the jury trial in Civil Las Vegas 80-135 RDF, Frank Briscoe Company, Inc. versus Clark County, et al.

All counsel are present, Your Honor.

THE COURT: Thank you, Miss Clerk. This is the time fixed for the Court's ruling on pending motions.

I'll deal first with the Amended Comp[illegible]t filed herein on April 2nd, 1984.

Count I seeks recovery of the amount that the County withheld as liquidated damages, approximately two and a half million dollars.

Count II alleges extra work done and seeks damages. So both of those counts deal with damages. They do not allege breaches of contract or other substantive wrongs.

Count IV alleges that the County implied or warranted that all contract documents were complete, accurate and suitable. This same allegation is covered by the breach of contract claim in Count III paragraph 23-I which this Court has set out in interrogatory.

So the Court directs a verdict against Counts I, II and IV of the Amended Complaint.

As to Counts V and VII of the Amended Complaint, these are claims of Briscoe sounding in tort, claims of breaches of contract and breaches of implied warranty sounding in tort.

Now, the maximum recovery under Nevada law for all breach of contract claims in this case sounding in tort is a total of $50,000. Without considering provisions of the contract documents under Nevada law the comparatory negligence rule would apply, but Briscoe as I have said could not recover over $50,000 total if Briscoe's fault was less than 50 percent.

But looking at the contract and considering General Conditions 707 and 713, Briscoe in entering into the contract documents with the County has agreed that if it's at fault at all in connection with Briscoe's claims for damages for delay caused by the County, Briscoe cannot recover.

Therefore I'm going to direct a verdict against Briscoe on its breach of contract and breach of implied warranty claims that

sound in tort as being duplicitous of its breach of contract and breach of implied warranty claim sounding in contract.

In Court as well as in contract Briscoe is barred by General Conditions 707 and 713 in recovery if to any degree Briscoe caused the delay that Briscoe complains of.

So considering General Conditions 707 and 713, even if the Court gave the tort claims to the jury, the comparative negligence rule would not be applicable for reasons just stated and of course the $50,000 ceiling would apply.

So the court exercises its discretion and has decided not to instruct the jury on Briscoe's tort claims.

Further, this jury will have a very difficult time digesting all of the instructions in this complex case without having to consider two different theories of breach of contract, one sounding in tort and one sounding in contract.

Now, turning to the allegations of Count III of the Amended Complaint and in particular to paragraph 23 and its various subdivisions, this Court directs a verdict against Briscoe and in favor of the County on Briscoe's claim in paragraph 23-O charging failure to inspect, similarly on paragraph 23-P, as in Paul, that's failure to make reasonable efforts to resolve disputes; and thirdly, relative to 23-Q, failure to properly administer the contract.

Paragraphs 23-L and M do not allege a breach of contract but are allegations of damages so the Court need not deal with that.

All other sub paragraphs of paragraph 23 of Count III alleging breaches of contract are included in the Court's Interrogatories No. 1 to 10 inclusive that you received the last time we were in session.

Now, as to paragraph 23-B where plaintiff alleges that the County failed to advise Briscoe that the County had restricted access to NECON, the Court directs a verdict against Briscoe on this count because Briscoe itself has no right to access to NECON, only the owner's engineer H.K. Ferguson and URS Company have been entitled to access to NECON's design calculations and personnel. Briscoe Company would not have had such a right expressly or impliedly. The claimed denial of access to NECON has to be construed to be a claimed denial of access to the owner's engineer and not to the contractor.

The Court directs a verdict in favor of the County and against Briscoe as to paragraph 23-D. Here it is alleged that Briscoe was denied access to parts of the construction site for unreasonably long periods of time by reason of segmentation.

The contract provides and this is instructions to bidder Addendum No. 3, No. 2, Item 2, page B-1; I repeat, instructions to bidders Addendum No. 3, No. 2, Item No. 2, page B-1, it provides that the contractor will however have access to the entire project, to the entire site for the duration of the project.

The County's motion for a directed verdict as to Count 16 of the amended complaint alleging abandonment of the contract and seeking damages for unjust enrichment on a quantum meruit basis is granted. So Count 16 is removed by a directed verdict in favor of the County and against Briscoe.

Now, let's turn to the motion filed by the County or I really should say the memorandum in support of the motion filed by the County for directed verdicts on July 3. I will follow the subdivisions as outlined in that brief found on page 2.

The first motion is, the first ground I should say is entitled failure to comply with presentment statute.

The Court notes that it dealt with this subject matter in its decision on motions filed March 3, 1986, pages 13 to 20 inclusive.

The Court's view at this time is that if the Nevada Supreme Court were called upon to pass upon the issue of the application of the presentment of claims statute to the facts of this case that that Court no doubt would hold the statute inapplicable. The statute mentioned in the decision on the motions of March 3, 1986 is NRS 244.250.

As stated, the Court believes if the Supreme Court had the facts of this case before it, it would hold that the presentment of claims statute is inapplicable.

Further, it now appears to this Court that the counterclaim in reply alleging breach of contract filed by Briscoe in response to the County's counterclaim against Briscoe for breach of contract may have been a compulsory counterclaim based upon the authority cited by Briscoe in its brief in opposition to the defendant's motion for a directed verdict, and if so, the Court now believes it is so under the Convalescent decision of the Nevada Supreme Court the presentment of claim statute does not apply.

Further, this court now believes, also believes that there has been substantial compliance with presentment of claim statute, therefore the motion for directed verdict number one, failure to comply with presentment statute is denied, and that's the defendant's motion for directed verdict, paragraph number one.

All of these are relative to the defendant's motion for a directed verdict.

The next ground, failure to exhaust administrative remedies. This is denied. This is a question of fact for the jury.

The third, lack of notice under the contract, this is denied. This is a question of fact for the jury.

Number four, the statute of limitations, this is denied. There is no issue for the jury.

Number five, accord and satisfaction, this is denied, a fact question for the jury.

Number six, certain damages are precluded by contract, denied, question of fact for the jury.

Number seven, lack of causation, denied. Question of fact for the jury.

Number nine, which is really number eight, is failure of proof. This is denied as being moot.

The plaintiff offered no evidence relative to the loss of business opportunity or damage to its reputation or standing in the financial community and those elements are not a part of plaintiff's damage claimed.

Now, there is one motion that the plaintiff made for a directed verdict and that was that on the issue of accord and satisfaction the only conclusion that can be drawn is that there was an accord and satisfaction. This is denied. The question of accord and satisfaction is for the jury.

Now, we'll turn to the instructions.

I will give recently submitted Defendant's 43 and 44, these are from Devitt and Blackmar 72 – I'm sorry, these are plaintiff's instructions, I will give plaintiff's 43 and 44, Plaintiff 43 is Devitt and Blackmar 72.16 and 44 is Devitt and Blackmar 72.17. I'll give those two instructions.

I will give two instructions submitted by the defendant that were not numbered or otherwise designated. They are entitled one, interpretation of contract provisions; and, two, waiver of contract provisions. Those were recently submitted.

I will not give any of the interrogatories proposed by the defendant relative to, one, delay claims; two, extra work claims; three, acceleration claims and four escalation claims.

I will give defendant's substitute for the following instructions of plaintiff's, Plaintiff's 31, Plaintiff's 30, Plaintiff's 17, Plaintiff's 35, Plaintiff's 33.

Earlier in the trial I spent a lot of time thinking about how to present this case to the jury in the best way. I studied and agonized over the approach that the defendant wants the Court to take, that is of having the jury consider each delay claim and whether or not it, quote Mr. Wachter, it derives the end date, and all I got into was a quagmire and I finally decided the only way this could properly be presented would be to give the jury interrogatories based on specific allegations on breach of contract which I've done.

I have read through the work that the defendant's proposed. There is a lot of work there, but it's a maze and I'm sure the jury would never find their way through it so I'm rejecting that approach entirely and I will give the case to the jury on the interrogatories that you now have.

Now, Dean isn't with us today. She broke her foot in the line of duty. She is home and hopefully she will be here next week.

But she was talking to the staff of both sides about progress on preparing the volumes of exhibits. Could you gentlemen report to me on that, how you are coming along and if there is anything I can do to help. I think they should be here available at the time of argument next Monday so that counsel can refer to them in argument.

Mr. Rickdall?

MR. RICKDALL: Yes, Your Honor.

If it please the Court, we have a list, a master list of exhibits that in keeping with the Court's directions on the day we recessed after the evidence and in setting out a road map or a chart as the Court's view was, what we have done is take the ten interrogatories that pertained to the plaintiff's alleged breaches of contract and under each of those interrogatories phrased the same way are the events or consequences which are now called the Wachter impacts that substantiate from the plaintiff's point of view each breach of contract.

Those charts contain documentary and testimonial references by page, by exhibit number.

In addition to that, there would be if you will these ten piles, each substantiating a particular breach of contract as expressed –

THE COURT: Those will be exhibits and excerpts from the transcript?

MR. RICKDALL: Here is how we propose to do it, Your Honor. That would require an immense amount of copying and multiplying of the documents.

THE COURT: Yes.

MR. RICKDALL: Mr. Meyer and I decided that the best way is on the shelf, if you will, will be a master set of documents in three-ring binders in exhibit order.

THE COURT: One of each?

MR. RICKDALL: Yes.

THE COURT: In what order?

MR. RICKDALL: In exhibit number order or in numerical order rather than chronological order.

THE COURT: Yes. I used the word chronological and got everyone confused including myself.

Of course they will have two sets of transcripts, you understand that. They will have mine and the originals.

MR. RICKDALL: Yes. There will be a master index along with that master set of documents. Then in addition to that as to each breach of contract as expressed in the interrogatories there will be a list of documents, that is references to the master list of the documents from that master set of exhibits that the jury can go to to look at in support of that –

THE COURT: I guess I lost you. I thought you just said that. Is there something else? What did you say a minute ago about the master list of exhibits?

MR. RICKDALL: Right.

THE COURT: And the impacts related to the ten alleged breaches of contract?

MR. RICKDALL: Right. There will be ten separate piles, if you will.

THE COURT: All right.

MR. RICKDALL: And there will be an index for each breach of contract referring to access to the master list of exhibits.

THE COURT: I see.

MR. RICKDALL: And each pile will have testimonial and documentary references.

THE COURT: That index to each pile I guess is a good way to put it will refer to the transcript as well?

MR. RICKDALL: Yes, Your Honor.

THE COURT: But you are not going to copy pages of the transcript?

MR. RICKDALL: No, Your Honor. We have figured the jury could go to the transcript if they so desired.

THE COURT: Dean prepared a master index of the witnesses in order of their appearances. I don't know whether she furnished that to your people or not, but starting with Volume 1, right on through the pages which will be made available to you just for assisting the jury. Maybe you have done the same thing. But it will be an index of the testimony.

MR. RICKDALL: Mr. Meyer is preparing something similar to that.

THE COURT: All right. Fine. As long as we cover it.

MR. RICKDALL: Also, the master list now in keeping with the Court's desire to reduce the number of documents has been substantially culled, Your Honor. The one remaining question now that we had is should a document arise, we have tried to include everything relevant to the best of our ability but at the same time drastically culling these documents.

Will the jury have access to other documents that if the question arose that –

THE COURT: If they ask for it?

MR. RICKDALL: Yes.

THE COURT: Certainly. I would think there would be no objection by the defendant. If the jury says we'd like to see exhibit so and so and it's not in one of the ten piles, the clerk will get it for them.

MR. RICKDALL: Yes. We pared this down as much as we could.

THE COURT: I'd rather you gamble that they won't need it with the understanding if they need it they will ask for it and we'll get it.

MR. RICKDALL: Does the Court have any further questions? I think that's how we conceived to assemble the material.

THE COURT: Thank you. You will have this all ready next Monday?

MR. RICKDALL: Yes.

THE COURT: Mr. Lalle?

MR. LALLE: We will have our packets ready on Monday also. It's my understanding there are about 1900 exhibits that have been introduced by the plaintiff and about 600 by the defendant. We are in the process of trying to cull them down to prepare a master index and then to organize them by subject. I'm not sure that the subjects we will organize them by will be the same as the ten interrogatories as the defendants or the plaintiffs.

THE COURT: As long as it's clear what subject it is.

MR. LALLE: Yes.

THE COURT: I don't think you need follow that, the same form the plaintiffs follow.

Now would you give me an example of a subject that you are talking about?

MR. LALLE: Well, Your Honor, I would think that one of the subjects would be, for instance, each of the Wachter impacts, and then another one would be the segmentation of the project and another one may be engineering services, but I'm not sure that I can organize our exhibits –

THE COURT: Now, will you be duplicating what's in the plaintiff's 10 files?

MR. LALLE: To some extent we may, Your Honor, but the piles will not, the subjects will not correspond to theirs. We intend to have one master index of all of the exhibits and cross references to the various subjects.

THE COURT: For each of the Wachter impacts you will have a copy of the exhibit with the pertinent language indicated.

Are you doing that? Are you highlighting the pertinent language?

MR. RICKDALL: Yes.

THE COURT: You take some of those Morrison-Knudsen meetings are that thick and you are highlighting it?

MR. RICKDALL: Yes, Your Honor.

THE COURT: You will highlight the subject matters and you will have in your supporting documents, copies of the exhibits highlighted that are pertinent to that; is that right?

MR. LALLE: Yes, Your Honor.

THE COURT: And references to the testimony by page and witness number?

MR. LALLE: We had not planned to include reference to the testimony, but I think we could if the Court wants us to and if the other side is going to do it we probably will do it ourselves.

THE COURT: If you want them to consider it. I'm so happy it's being pared down because, you know, if you just gave the jury these 2,500 exhibits I don't know how many of them they'd even look at.

MR. LALLE: Your Honor, if I could back up for a minute, on each of the individual piles if one exhibit applies to ten of our subjects, for instance or –

THE COURT: You won't duplicate it?

MR. LALLE: I don't intend to duplicate it but merely to cross reference it.

THE COURT: Fine. That's fine. All right, then, thank you, Mr. Lalle.

Mr. Rickdall.

MR. RICKDALL: If I may, I heard Mr. Lalle mention 1900, I wasn't sure if he meant the end product, what we have called. We are actually down to about 300 documents.

THE COURT: But you offered into evidence approximately 1900?

MR. RICKDALL: Yes.

THE COURT: And the defendant offered 600?

MR. LALLE: Yes. That's what's been offered so far.

THE COURT: Well, you are about one-sixth. If you could do the same thing you would only have 60 papers.

THE COURT: All right, then.

Now, as you know I didn't limit you on time but have you, might I have your thinking on how long you think you are going to argue? First, Mr. Galane? You won't be bound by it but just an indication.

MR. GALANE: I hope to finish the opening argument during the course of Thursday.

THE COURT: Three days. All right.

MR. GALANE: Three and a half days if we start Monday morning, that means about the close of the day Thursday, that's opening argument.

THE COURT: If you do that we will not have a session on Friday.

Don't you have another matter on Friday with Judge Crockett?

MR. GALANE: I do and I'm doing nothing to affect that matter.

THE COURT: And then the defendant can argue the following Monday, then. And how many days do you think, Mr. Lalle?

MR. LALLE: Your Honor, at this time my best guess is somewhere between one and a half and two days.

THE COURT: All right. And what about your closing, Mr. Galane?

MR. GALANE: I'd have great difficulty speaking longer than Mr. Lalle. If he's down to one and a half to two I would say at the outside the same amount and I doubt if I'd go that distance.

THE COURT: All right.

MR. GALANE: It depends what he says, Your Honor. It's very difficult to anticipate a rebuttal.

THE COURT: Well, I have given you an awful lot of time to get ready for your arguments because I think it will bear fruit. This is a difficult case to argue, it's so complex and so voluminous and I have told counsel that, but I hope that the time will be well spent and issues will be sharpened for the jury so that they will benefit a great deal from the argument.

All right.

I'm going to have each of the jurors presented with a set of the interrogatories and Court's four and five, instructions four and five which introduce the interrogatories. Four applies to the ten interrogatories that are the plaintiff's alleged breaches of contract, and five applies to the two that pertain to the counterclaim. I'll let them read along as I go through with it, and if you want to they will be available, if you want to have them look at them during argument, Mr. Galane and Mr. Lalle, you can do that, too. They will be available.

And as to instructions that you know we agreed upon, I certainly think it's appropriate for counsel to say the Court will instruct this way and that way. I kind of like lawyers to say probably will or it's my understanding. Something may come up and we might change our mind on that so I expect the Court to instruct you thus and so and certainly you can do that as you see fit during your arguments.

Now, I gave you a little pamphlet about the suggestion coming from the administrative office of the United States Courts that Federal Courts throughout the country are trying to keep the alternates in the deliberation process. I would be willing if counsel are willing to present this, have this case presented and deliberated upon by all eight jurors with the

understanding that if anybody becomes ill it would be a verdict of seven but never a verdict of less than six unless there was a further stipulation; or we could have the two alternates, they don't know who they are by the way, you do. We have kept that from them, I think, but Mrs. Vasquez and Mrs. Cochran are the alternates, and have them stand by in case someone becomes ill and is for some other reason unable to deliberate, but then the case law as I understand it says the jury has to start over and not just bring them up to speed but just start over in their deliberations. Well, that would be a monstrous thing in this case and practically I would think impossible.

So, I guess if we just send the six jurors out to deliberate, that will probably be the only ones that will deliberate, but as my bailiff said Mrs. Vasquez, for example, has made a financial sacrifice to stay on this case. She could have been excused because she works for the Desert Inn Country Club and doesn't make a great deal of money, but she is a fine lady and she is taking a cut in pay to finish this case so I'm not pleading for her but I know that she very much would like to be involved in the deliberations.

But as I say, if we adhere to the regular rule I'd simply excuse them and because I doubt we could inject them at a later time into deliberations. I don't ask you to decide that now. We don't have to decide that until the arguments are over with, but why don't you think about that and tell me what you want to do.

Of course I can't do it without, I can't have all eight deliberate without both parties' consent. If there is no consent, then the six jurors will deliberate.

So you might be thinking of that.

Is there anything else that counsel wish to bring up at this time? Mr. Beadie?

MR. BEADIE: Your Honor, I had just a couple of comments on the instructions as you proposed them and I wondered if it would be appropriate now to tell you what those comments are?

THE COURT: All right.

MR. BEADIE: Because we were going to suggest or ask if we could make one or two minor changes to them.

You have an instruction on accord and satisfaction. We have no objection to the instruction so far as it reads but feel that there might be an additional instruction given on that point that says that the burden is on the county to clearly establish that there is an accord and satisfaction. I feel the law indicates that –

THE COURT: Are you talking about a clear and convincing evidence? I don't want to give them two burdens. The defendants suggested some.

MR. BEADIE: Excuse me?

THE COURT: Is that a clear and convincing evidence burden?

MR. BEADIE: Yes.

THE COURT: I'm not going to give that. I know it's the law in some areas, but I think it's confusing. I'm instructing them on the preponderance of the evidence. I'm sure you are going to argue on that and I hate to turn to another standard for some particular defense.

MR. BEADIE: Your Honor, if I could.

THE COURT: But you have made a record of offering on that so you protect yourself on appeal, but I don't think it will make any difference to the jury in their deliberations anyway.

MR. BEADIE: Your Honor, on one other instruction, it's an instruction that runs at some length but the pertinent part of it that concerns me is that it says in one sentence that if –

THE COURT: Can I have the designation?

MR. BEADIE: It's defendant's revised page 31, although I think in fact it appears on Defendant's Proposed page 32, but the way it's shown in the Court's proposed instructions it simply says at the bottom defendant's revised page 31.

And it appears the next to the last page of the instructions before you get into the interrogatories, and the sentence that is of concern to us is one that says if you find Briscoe failed to comply with the contract requirements regarding the preparation and use of its schedule, then you may infer that Briscoe's failure to make progress sufficient to complete the contract at the time specified in the contract is not the responsibility of the County.

First is that I see no case law that would support that, and of course I see nothing in the contract that would support that.

THE COURT: You didn't object to that before, did you?

MR. BEADIE: No, we did not, Your Honor. We did not register an objection until this time. And I do so because I don't feel there is any support in the law for it or in the contract for it. I think it's a matter of argument.

THE COURT: Let me find that quickly.

Oh, yeah.

MR. BEADIE: It's the first sentence of the last paragraph of that instruction which is actually a two-page instruction, I think. Yes.

THE COURT: All right. How about the next sentence?

MR. BEADIE: The last sentence, no. It's only the first sentence of that paragraph.

THE COURT: All right. I'll consider that. I see what you are talking about.

MR. BEADIE: Finally, Your Honor, a very minor point, but it relates to the instruction on notice, and it's in a sentence that says that in order to receive compensation for any delay the contract required Briscoe to file a written notice of claim with the County and the engineer within ten days.

I think the evidence would show that all Briscoe was ever obliged to do was file a notice with M-K. Frankly I think –

THE COURT: It says County and the engineer.

MR. BEADIE: And engineer.

THE COURT: And actually the notices all went to M-K.

MR. BEADIE: I think frankly if you just strike and the engineer and leave in County and that will make it sufficiently clear.

THE COURT: All right.

MR. BEADIE: Finally, just by way of clarification, when you, in treating Counts I and II of the amended complaint,

throughout those two counts one which asks for the contract retainage and the other that seeks extras, I assume that you are intending those two items would be included in our damage claim?

THE COURT: Yes. I simply, they are not, I just wanted to comment on them. They are allegations but they really are claims of damage flowing from the breaches of contract.

MR. BEADIE: Should we put, Your Honor, in writing any of the things I proposed here as I talk to you or shall I leave it at this?

THE COURT: I don't think you need to do that, Mr. Beadie.

MR. BEADIE: Mr. Rickdall has one other point on the jury interrogatories and then I think that's all we have.

THE COURT: Mr. Rickdall?

MR. RICKDALL: I believe that with regards to each of the first ten interrogatories, Your Honor, there is one proposed change we would like to point out and that's with interrogatory sub three that goes along with each interrogatory. Presently reading, was this delay entirely the fault of the County, that is was Briscoe wholly without fault.

What we propose is that interrogatory should read for how many days, if any, was Briscoe at fault. That is for how many days if any was Briscoe at fault. The reason for that is there could be a delay period running some number of days for a long period of time, and if the jury were to find that Briscoe during the course of that time period had some fault for a day or two, for example, then corrected their matters, the delay would still be continuing to run at the County's fault whereas when you read

this it would indicate that the slightest discrepancy during an entire delay period would somehow collapse Briscoe's whole delay period as it now reads.

THE COURT: Well, of course, we are dealing with a delay that flows from the breach of contract.

MR. RICKDALL: Yes, Your Honor.

THE COURT: And it's all in the context of the particular breach of contract that the interrogatory deals with and so was the delay that flows from the breach of contract entirely the fault of the County and Briscoe wholly without fault. If we get into how many days, then we are getting into the quagmire that I mentioned earlier of do we ask the jury in dealing specifically with interrogatories –

MR. RICKDALL: So long as –

THE COURT: You can argue that. Certainly you can argue that.

MR. RICKDALL: If we can argue that point, we can leave it just as it is. Thank you, Your Honor.

THE COURT: I'm not going to change interrogatories.

MR. BEADIE: Your Honor –

THE COURT: Now, what about – yes, Mr. Beadie?

MR. BEADIE: You mentioned on the accord and satisfaction burden of proof instruction that I might make that as a proposition to the Court, I appreciate your ruling on that, but I have a written proposed instruction. If you like I can submit that so it makes the record clear.

THE COURT: Yes, please.

THE COURT: All right. What about the portion of Defendant's Revised 31, it shouldn't be page 31. I guess it is. Yes. It was in the original group the defendants submitted, what about this 31, this sentence that defendant, that the plaintiff wanted to take out, Mr. Lalle or one of the other attorneys?

MR. LALLE: Your Honor, Mr. Keating will respond to that.

MR. KEATING: Your Honor, I have to say that, excuse me, let me get up to the podium. Having just heard that proposition from plaintiff's counsel I haven't had as much of a chance to fully consider it as I might have if it had been filed last week, but it seems to me that the first sentence says you may infer Briscoe's failure to make progress sufficient to complete the contract at the time specified on the contract is not the responsibility of the County is a rather permissive requirement. It doesn't say they have to, but it is a way that they can find, and I think it's an important facet of that so that the instruction itself gives them that option or alternative and doesn't foreclose that permissive inference.

I think it's important to leave it in there, Your Honor.

THE COURT: All right. Well, I'll consider that.

Anything else, counsel?

MR. LALLE: Nothing, Your Honor.

MR. KEATING: Nothing, Your Honor.

MR. BEADIE: Nothing, Your Honor.

THE COURT: All right. We'll adjourn now until next Monday at nine o'clock.

(Thereupon the taking of the trial was recessed to Monday, July 28, 1986, at nine o'clock a.m.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Civil-S-80-135-RDF

FRANK BRISCOE COMPANY, INC.,
Plaintiff,

vs.

COUNTY OF CLARK
Defendant.

ORDER DENYING MOTION FOR MISTRIAL

Filed August 11, 1986

On March 3, 1986, the Defendant County of Clark filed a Motion for Mistrial on the grounds "that the two and one-half month continuance prejudiced the County's ability to obtain a fair trial."

Testimony in this case began on November 18, 1985, and continued until December 19, 1985. The Court then took a Christmas recess from December 19, 1985 to January 6, 1986, to which counsel for the parties implicitly agreed having voiced no objection.

Thereafter, sua sponte, the Court continued the case for an additional period from January 6, 1986 to March 11, 1986. Testimony continued from March 11, 1986 to July 2, 1986. July 2, 1986 was the seventy-seventh day of trial.

In this case, the twenty days of trial in November and December, 1985 were not a substantial part of the total trial time.

In its mistrial motion, the defendant argues that in 1985 the principal part of Briscoe's case was put in regarding Briscoe's claims against Clark County. I disagree. I would not have recessed the trial from January 6, 1986 to March 11, 1986, had I believed that such a delay would cause substantial prejudice to either party. I felt that the trial was in the early stages as of January, 1986. This is a very complex trial because fact issues are technical and so numerous and documents introduced are so voluminous. The plaintiff has introduced at the close of the evidence approximately 1900 exhibits and the defendant 600 exhibits.

Sustaining the burden of proof is difficult in this case because the issues are so technical, so complex and the testimony and documents so voluminous.

Upon review of the transcript it is clear that the November, 1985 testimony, for the most part, was in the nature of orientation. The plaintiff's counsel, through a number of witnesses, was acquainting the jury with the Clark County AWT Plant; how it operated, what its parts were and how they worked together. Believing that twenty days of testimony in 1985 was an insubstantial part of the total testimony related to Briscoe's claims, I continued the case from January 6, 1986 to March 11, 1986.

After carefully considering the defendant's mistrial motion and the plaintiff's response, I conclude that the only possible prejudice as a result of the January 6, 1986 to March 11, 1986 delay is to the plaintiff and not the defendant.

As I see it, the principal effect of the delay on the jury is that memories of earlier testimony is dimmed. The jurors may have

forgotten much of the testimony of 1985 witnesses on both direct and cross examination. They may have forgotten the demeanor and manner of witnesses as well. If we assume, as undoubtedly is the case, the 1985 testimony as a whole is more favorable to the plaintiff than the defendant, the delay is a loss for the plaintiff and a gain for the defendant. With the burden of proof being on the plaintiff, dimmed memories of proof in 1985, because of delay, is a loss for the plaintiff and a gain for the defendant.

Because I felt that the jurors' memories of the 1985 testimony had dimmed by the January 6, 1986 to March 11, 1986 delay, I spoke to counsel when the court reconvened in March, 1986, suggesting a stipulation relative to calling summary witnesses.

Since the jury will have the transcript of the testimony in the juryroom during deliberation, the jury may read any testimony given in 1985, but it is likely that they cannot fully recall the demeanor and manner of witnesses from the reading of the transcripts. So if the demeanor and manner was good, as I believe it was, and the jurors do not remember this and cannot recall it from reading the transcripts of the 1985 testimony, then again this is a loss for the plaintiff and a gain for the defendant. Only if the demeanor and manner of the 1985 witnesses was poor, which was not the case, as I see it, could the defendant be disadvantaged. It is only if we assume that the 1985 witnesses had poor demeanor and manner, and that such demeanor and manner was forgotten by the jurors, would there be a loss for the defendant.

For Dr. Loftus' proposition to have merit here, our jury must have had a clear comprehension of the plaintiff's case in 1985. For the Loftus position to have validity in this case, plaintiff's evidence in support of its claims must have in the 1985 period been clear and convincing with no defense apparent

to the rational mind. If such were the case and letting the testimony sink in over the two month period could possibly be a benefit to the plaintiff. Further, it must be assumed that during the January 6, 1986 to March 11, 1986 delay, jurors spent a considerable amount of time thinking about the case.

Dr. Loftus' proposition may have merit in certain cases, but not here because the 1985 evidence did not establish the plaintiff's claims clearly and convincingly and it is unreasonable to assume that the jurors spent the sixty-three day period thinking repeatedly about the evidence in this case.

At the time of the Christmas recess any proof the plaintiff had offered was incomplete so there is no reasonable probability that jurors could have concluded at that time that the plaintiff should prevail.

Furthermore, I am satisfied that at the time of the Christmas recess, the jurors could not have had a clear picture of the facts of the case, as I did not at that time. I must presume that the jurors heeded the court's admonition about keeping an open mind and not allowing themselves to reach conclusions as to the merits of the case, until they retire for deliberation. As of Christmas, 1985, evidence received was inconclusive and generally unrelated, just bits and pieces of evidence regarding plaintiff's claims and as stated, much evidence was in the nature of orientation. Reference is made to the court's admonition to the jurors on December 9, 1985, pp. 2512 to 2515 and on March 11, 1986, pp. 4175 to 4176.

I must reject out of hand Dr. Loftus' proposition as applied here. Insofar as to the delay is concerned, it was clearly a gain for the defendant and a loss for the plaintiff.

Up to the Christmas recess the jury could only have had vague and inconclusive notions about the plaintiff's claims. The

plaintiff's evidence is too complex and much too technical to have been digested by the jury in the first twenty days. It was impossible for jurors, in a rational manner, to reach conclusions that any of the plaintiff's claims had real merit. At the extreme, only very tentative views of the merits of the case could have been reached by the jury in 1985, if we assume that the jury disregarded the court's admonition.

In a word, as the jury resumed hearing testimony in 1986, they simply could not have reached an opinion that the plaintiff's claims were valid.

The plaintiff had a distinct disadvantage having put their proof on first because of the complexity and technical nature of the evidence. This disadvantage continued to some extent in March of 1986, but, when in May, 1986, the defendant began putting on its evidence, the jurors could listen and understand the testimony much better than they could when the earlier testimony was presented in 1985.

What I am saying is, assuming that the jurors paid strict and careful attention to the evidence that transpired in the courtroom from the beginning in 1985 to July, 1986, they undoubtedly were able to comprehend and relate the evidence better when the defendant was putting on their case in chief than when the plaintiff was putting on their case in chief.

I say this from personal knowledge because during a great part of the plaintiff's case much of the testimony was hard to understand and almost impossible to relate to other evidence in the case. It wasn't until near the end of the plaintiff's case that the picture began to become clear for me, that is, a mosaic began to appear.

Viewed in toto, the January 6, 1986 to March 11, 1986 delay could have damaged only the plaintiff and in no way have damaged the defendant.

The Defendant's Motion for Mistrial is denied.

August 11, 1986

/s/ Roger D. Foley
U.S. DISTRICT JUDGE

AFFIDAVIT OF ELIZABETH LOFTUS

COUNTY OF KING)
)
STATE OF WASHINGTON)

1. I, Elizabeth Loftus, declare under penalty of perjury as follows:

2. I am a Professor of Psychology and an Adjunct Professor of Law at the University of Washington in Seattle. I received my M.A. in Psychology from Stanford University in 1970. I have also taught as a Visiting Professor at Harvard University (1975-1976) on the subject of Law and Psychology and at the National Judicial College, University of Nevada (1975-85, summers). I have recently been appointed to a position as a visiting professor at Georgetown University Law Center for 1986.

3. I am the author of approximately eleven books and one hundred and fifty articles, the majority of which concern human information processing. Much of my work has focused on juror decision-making and juror comprehension. I am currently the Psychology Consultant to the American Bar Association Committee on Juror Comprehension of Complex Litigation. I have served in this capacity for two years and have been engaged in an ongoing study of juror comprehension in complex cases. I have also served on the National Academy of Science Committee on the Use of Statistical Evidence in Court (1982-1986).

4. I have served as President of both the American Psychology and Law Society (1985) and the Western Psychological Association (1983-1984). I have also served on the Editorial Boards of numerous journals including Law and Human Behavior, Human Learning, Social Cognition, Law and Society Review and the Journal of Experimental Psychology. My research on human memory and jury behavior has been funded by the National Science Foundation and the National

Institute of Mental Health as well as other foundations and government agencies. I have also served as a consultant to the Department of Justice for its National Crime Survey (1980).

5. I have spoken with Wayne Lalle, counsel for the defendant and he has brought to my attention that a recess was declared after about eighteen days of trial while the plaintiff was presenting evidence and that the recess has lasted about two and one half months. I believe this delay is damaging for a number of reasons. First, my research into juror decision-making leads me to believe that in most trials jurors go through a process of shifting their opinions about a case as the trial progresses. Each juror will shift within a certain range of feelings and opinions on a spectrum from more pro-plaintiff to less pro-plaintiff. The range of the spectrum within which each juror's opinions are located will of course vary for each juror with some being more pro-plaintiff and others more pro-defense. However, the process is often the same – that is the jurors are likely to be at the most pro-plaintiff position with respect to their individual ranges after a substantial part of the plaintiff's case has been presented. As the defendant begins its presentation, there is often a shift in opinion for many jurors towards the defendant's position. If one were to presume that the jurors in this case have reacted as most jurors do, then it is likely that the jurors were about as pro-plaintiff at the time of the recess in the trial as they would have been at any other point in this trial.

6. This orientation creates a problem for the defendant because of the way in which people continue to process information after they receive it. These jurors have no doubt continued to think about this case as they have gone about their lives. The interaction of their thoughts and feelings about the case with the events of their lives would tend to strengthen or solidify the impressions that they had at the time of the recess. Unfortunately, these impressions would not be formed from a balanced cross-section of the trial. Rather, they would be based on the presentation of plaintiff's witnesses, and the plaintiff's themes as conveyed through their witnesses. Despite cross-

examination the defense has not yet had a chance to show the jury the strengths of its side of the case. Thus, as the jurors would have continued to think about the case, they would have done so without the benefit of the defense's witnesses.

7. This continued processing of information about the case has probably been exacerbated by the likelihood that at least a few of the jurors may have spoken about the case with friends or family. It has been estimated that in trials of short duration approximately 11% of the jurors discuss the case in spite of admonitions not to do so. In my opinion, a long trial is more likely to lead jurors to discuss the case.

8. The damage to the defendant is likely to increase as the trial recommences. In a complex case, jurors tend to learn through the repetition of information and themes. Naturally, counsel for the plaintiff will want to insure that the jurors are following their case as they resume testimony, and so there will be a natural inclination to repeat basic information and points important to the plaintiff's case. This repetition is occurring in a pattern that is optimal for the jurors' learning of the plaintiff's case. Psychologists have found that learning tends to be increased when repetition of material is spaced out over time. This is known as "spaced repetition," and it is an effective tool for helping people to learn and remember. It is a better approach than what is known as "massed repetition," which is the intensive drumming in of information in a short period of time. People experience this phenomenon all the time in their lives as they try to remember information, whether it is the name of an acquaintance or the directions for a complicated computer program. The opportunity which the plaintiff now has of leading jurors through this repetition of basic information and themes is thus likely to prove the jurors with a better grasp of the plaintiff's case. It is also an opportunity which the defendant will not have.

9. In summary, I believe the recess in the trial is likely to have helped jurors to have solidified whatever pro-plaintiff

orientation they had developed by hearing a major portion of the plaintiff's case, and I believe the process of refreshing the jurors' memories, which will inevitably occur, further disadvantages the defendant.

10. If the court wishes me to do so, I can more fully elaborate on these opinions and concerns through testimony presented in person.

/s/ Elizabeth Loftus

Subscribed and sworn to before me.
this 4th day of March, 1986.

/s/ Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NO. 87-2230
Civ. No. LV 80-135 RDF

FRANK BRISCOE COMPANY, INC.,
a corporation,
Plaintiff,

v.

COUNTY OF CLARK,
a political subdivision of the
State of Nevada,
Defendant.

March 3, 1986

DECISION AND ORDER ON MOTIONS TO DISMISS

Roger D. Foley, District Judge

INTRODUCTION

Pursuant to Chapter 790, 1973 Statutes of Nevada, the County of Clark of the State of Nevada (County) was assigned the responsibility for the development and implementation of a pollution abatement plan for the Las Vegas Wash and the Las Vegas Bay arm of Lake Mead. The County, pursuant to the above authority, adopted a waste water resources management plan, electing to build an advanced waste water treatment plant (AWTP) to export from the Las Vegas Wash fully processed

waste water solids, the product of the AWTP, and to reclaim the waters discharged from the plant for in-valley irrigation, power and industry use and possibly future ground water recharge, all as described in County's report of September 1973 to the Governor.

The County, desiring to design, construct, own, operate and maintain an AWTP as soon as possible, engaged, by written contract of January 7, 1974, Exhibit 5 in evidence, the consulting services of a group of professional engineering firms (NECON) to provide complete professional engineering and technical services for the planning, designing, financing and construction of the AWTP. Among the many duties undertaken by contract with the County, NECON was to design an AWTP of approximately 90 million gallons per day and connect it with the existing secondary waste water treatment plant.

NECON prepared plans and specifications and bidding documents for the County which the County approved. (Exhibit 1, Exhibit 1.1, Exhibit 1.2 and Exhibit 1.3.) After the bidding process, the County awarded the contract for the construction of the AWTP to Frank Briscoe Company, Inc. (Briscoe), the plaintiff herein, on March 17, 1977 (Exhibit 2), and work began shortly thereafter.

On May 7, 1980, Briscoe brought this action on the construction contract for the AWTP against the County and others seeking from the County declaratory and injunctive relief and specific performance of the contract. Briscoe did not seek damages against the County. On July 31, 1980, the County answered Briscoe's complaint and asserted by way of counterclaim that Briscoe had breached the contract. On September 15, 1980, Briscoe replied to the County's counterclaim by a counterclaim in reply alleging that the County had breached the contract. On April 2, 1984, Briscoe, with leave of the Court, filed its amended complaint. On April 16,

1984 (#714), the County filed a motion to dismiss the amended complaint. The same was responded to and the County replied. The Clerk submitted the motion to the Court for decision on October 3, 1984. The motion remains undecided.

All of the private corporation defendants named in the amended complaint have been previously dismissed. (See order re motions 6/12/85, #1241.) In addition to the County, there remain defendants named in the amended complaint Clark County Sanitation District No. 1, a special county district, its Board, the Board of County Commissioners, and a number of individual county officers and employees (noncontracting county defendants).

I. THE NONCONTRACTING COUNTY DEFENDANTS

[1] This Court believes that the County is correct that there can be no ex contractu liability by agency. There is no privity of contract between Briscoe and the noncontracting county defendants. As a matter of law, a noncontracting county defendant cannot be held liable in contract to Briscoe even if the agency allegations are true. All of the remaining defendants in the amended complaint, except Clark County, are dismissed with prejudice.

II. WAIVER OF SOVEREIGN IMMUNITY

In 1965 the State of Nevada, for itself and its political subdivisions, conditionally and with limitation, waived its sovereign immunity from suit and consented to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations. (NRS 41.031.) Hence, this action for breach of contract, breach of implied warranty and for tortious breach of contract and breach of implied warranty as set forth in the amended complaint, could lawfully be brought against the County subject to the conditions and limitations of the waiver.

(A) The Discretionary Function Exception

NRS 41.032 provides in pertinent part:

> [n]o action may be brought under NRS 41.031 or against an officer or employee of the state or any of its . . . political subdivisions which is:
>
> . . . .

> 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any officer or employee of any of these, whether or not the discretion involved is abused.

It should be noted that by NRS 41.031 the state for itself and its political subdivisions waives sovereign immunity and consent to be sued for, among other claims that could be brought against a private person or corporation, claims for breach of contract and for tort. This is unlike the Federal Tort Claims Act, 28 U.S.C. § 1346(b), which, conditionally and with limitations, waives United States sovereign immunity from tort. But the language of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), is in substance identical with the language of NRS 41.032(2). Thus, decisions of the United States Supreme Court dealing with the scope of 28 U.S.C. § 2680(a), *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427, and later cases of the high court, are controlling and other federal cases are good precedent in the construction of NRS 41.032(2).

The County's motion to dismiss argues that Briscoe, in its amended complaint, seeks to hold the County liable for its actions taken and its failure to act during the exercise or performance of discretionary functions or duties. In considering this argument, it is noted that NRS 41.032(2) is as broad as is the waiver of sovereign immunity, NRS 41.031, and applies to actions for breach of contract, breach of implied warranty and for all actions sounding in tort, including cases arising out of breach of contract and breach of implied warranty as alleged in the amended complaint. Briscoe attempts to get around NRS 41.031 and 41.032(2) by claiming that the County engaged in proprietary acts, rather than governmental acts. This effort must fail. The Nevada Legislature abolished any such distinction in

1965 when it enacted NRS 41.031 et seq., *Harrigan v. Reno*, 86 Nev. 678, 475 P.2d 94 (1970). Nevada cases prior to 1965 and cases from other jurisdictions that are in point, where the defense of sovereign immunity was avoided in one way or another, such as by distinguishing proprietary acts from governmental acts, are not controlling or persuasive as to Nevada law after 1965. As the Nevada Supreme Court stated in *State v. Silva*, 86 Nev. 911, 914, 478 P.2d 591 (1970):

> Before the enactment of the statutory waiver of immunity, Nevada case law on the viability of the doctrine of sovereign immunity was uncertain and in flux. *Walsh v. Clark Co. School Dist.*, 82 Nev. 414, 419 P.2d 774 (1966); *Hardgrave v. State ex rel. Hwy. Dep't*, 80 Nev. 74, 389 P.2d 249 (1964); *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963). The trend was toward the judicial abolition of that doctrine. *Rice v. Clark County*, supra. It is only fair to assume that the 1965 Legislature reacted to that trend, and elected to waive immunity within limits and impose a ceiling upon the recovery allowable to a claimant, rather than await further judicial action upon the subject. The apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limitations upon that waiver.

Since 1965, all claims of whatever nature that could be brought against natural persons or corporations can be brought against the State and its political subdivisions only under the conditions and limitations spelled out in the 1965 waiver of Sovereign Immunity Act.

This Court does not have jurisdiction under NRS 41.031 over this suit against the County to the extent that the actions or inactions of the County complained of were taken or omitted during the exercise or performance of discretionary functions or

duties. NRS 41.032(2) is an exception to the waiver of sovereign immunity. Sovereign immunity is not waived if the action or inaction complained of was taken or omitted during the exercise or performance of discretionary function or duty.

1. Third Count of Amended Complaint

(a) The Termination of NECON

[2] In paragraphs 23(a) and (b) of the Third Count, the County's decision to terminate NECON and to replace it with other engineers, without providing Briscoe with access to NECON's design calculations and other work product, after the contract of Briscoe was entered into and after construction had begun, is alleged by Briscoe to have been a breach of contract.

The decision to terminate NECON without providing access to their design calculations and other work product, and the replacing of NECON with other engineers were all actions or inactions taken during the exercise or performance of discretionary functions and are exempt and not actionable.

(b) Segmentation into Four Separate Phases

[3] In paragraphs 23(d), (e) and (f) of the Third Count, the County's decision to segment the job into four separate phases and to require Briscoe to submit progress schedules in accordance with such segments is alleged by Briscoe to have been a breach of contract.

The decision to divide the construction project into four separate phases and to impose different dates for commencement of construction of each phase, were all actions or inactions taken during the exercise or performance of discretionary functions, and are exempt and not actionable.

(c) Pre-bidder Submittals

[4] In paragraphs 23(g) and (h) of the Third Count, the manner in which the County examined the pre-bid submittals and its failure to provide bidders with information as to the modification of plans and specifications necessary to accommodate pre-bid submittals in the bids, is assigned by Briscoe as a breach of contract.

The procedures adopted by the County in reviewing pre-bid submittals and not providing bidders with information about the same prior to bid, and the decision not to perform design work, and the decision not to modify the plans or specifications to accommodate pre-bid submittal equipment, are all actions or inactions taken during the exercise or performance of discretionary functions and are exempt and not actionable.

(d) Defective Plans and Specifications

[5] In paragraph 23(i) of the Third Count, Briscoe alleges that the plans and specifications furnished in the construction of AWTP were defective, inadequate and incomplete and that the County in this connection breached implied warranties.

The preparation of the plans and specifications for the construction of the AWTP, including the instruction to bidders by the County, all approved by the County, were the product of the exercise of the County's discretionary function and are exempt and not actionable.

Effect of Exercise of Discretionary Function May Result in Breach of Contract or Breach of Implied Warranty

[6, 7] Normally, the effects of, or the results of, or the product of, the exercise or failure to exercise discretionary functions, like the exercise or failure to exercise itself, are also not actionable. However, on March 17, 1977, the County

entered into the contract for the construction of the AWTP with Briscoe and thereafter the effects of, or the results of, or the product of, the exercise or failure to exercise discretionary functions upon the construction contract and Briscoe's performance thereof, became actionable by virtue of the construction contract. This is so because the County in the contract made certain promises, express and implied, and for the breach of which Briscoe can recover damages. The County, having made such promises, must be accountable in court for any breach of the same and cannot shield itself from liability simply because the damages alleged were the effect of, the result of, or the product of, the exercise or failure to exercise discretionary functions. It is not for the manner in which the County exercised or failed to exercise discretionary functions that Briscoe seeks damages in paragraphs 23(a), (b), (d), (e), (f), (g), (h) and (i) of the Third Count of the amended complaint, but for the effect of that exercise, or failure to exercise, discretionary functions upon the contract. The effect alleged is a breach of contract or breach of implied warranty, a breach of promises made by the County in the construction contract, express or implied. Unless the effect is actionable, the County could break its contract with Briscoe with impunity and hide under the basket of discretionary function. This would be intolerable.

In conclusion, while Briscoe cannot in this action reach the manner in which the County exercised, or failed to exercise, discretionary function, in the particulars set forth supra, Briscoe can hold the County fully accountable for its contractual promises, express or implied. The motions to dismiss paragraphs 23(a), (b), (d), (e), (f), (g), (h) and (i) of the Third Count are denied.

2. The Eighth Count of the Amended Complaint

[8, 9] In this count, Briscoe complains first that the manner in which the County exercised, or failed to exercise, its

discretionary functions was fraudulent and seeks exemplary or punitive damages. This, plaintiff may not do. The manner of exercise or failure to exercise the discretionary function is exempt and not actionable. But Briscoe also complains in this count of the effect of, or result of, or product of, the exercise or failure to exercise discretionary functions upon it and upon its performance of the construction contract and is in itself actionable.

Since this Eighth Count is ordered stricken infra for other reasons, suffice it to say here that any evidence that supports paragraphs 40-44, inclusive, of this Eighth Count may be received in support of paragraphs 23(d), (e), (f) and (i) of the Third Count to the extent that such evidence does in fact go to show breach of contract or breach of implied warranty.

(B) Limitations on Award of Damages in Tort

[10] In its Fifth Count and Seventh Count, Briscoe appears to have alleged tortious breach of contract and tortious breach of implied warranty and seeks damages against the County.

In its Sixth Count, Briscoe appears to seek punitive damages for tortious breach of contract and tortious breach of implied warranty against the County.

In its Eighth Count, Briscoe appears to seek punitive damages for the fraudulent and tortious breach of contract and breach of implied warranty by the County.

NRS 41.035 reads in pertinent part:

> An award for damages in an action sounding in tort brought under NRS 41.031 or against . . . any political subdivision . . . of the state . . . may not exceed the

> sum of $50,000 . . . An award may not include any amount as exemplary or punitive damages.

This limitation applies to the Fifth Count, Sixth Count, Seventh Count and Eighth Count.

Any recovery Briscoe could obtain for the torts alleged in Counts Five and Seven are limited to $50,000.

Briscoe may not recover punitive or exemplary damages for the torts alleged in the Sixth and Eighth Counts.

Although it appears that Briscoe does not seek punitive damages for breach of contract and breach of implied warranty but only for the tortious breach of contract and breach of implied warranty, if punitive or exemplary damages were sought for breach of contract and breach of implied warranty, NRS 42.010 would bar the same. That statute (cases in which exemplary or punitive damages may be awarded) excludes breaches of obligations arising from contract. The Sixth and Eighth Counts are stricken.

III. INDEMNITY CLAIM

(Seventh Count, paragraph 38(d))

[11] Briscoe may not seek indemnity from the County. The contract requires Briscoe to indemnify the County against the subcontractor for breach of contract claims. See 712, General Conditions.

IV. FIFTEENTH COUNT–CONSPIRACY

[12] The Fifteenth Count charges that the County and others conspired against Briscoe. The others, private parties, named as coconspirators, have all been dismissed. The noncontracting

county defendants are dismissed by this decision and order. Clark County is the only remaining defendant charged as conspirator and must be and is hereby dismissed. It cannot conspire against itself. Further, under Nevada law political subdivisions of the state are legally incapable of entering into a conspiracy.

V. PRESENTMENT OF CLAIMS STATUTES

[13] Under Nevada law, Briscoe must plead and prove that it presented its claims to the County within the time frame allowed by the applicable presentment of claims statutes. Such presentment is a condition precedent to suit. Briscoe is wrong in asserting that failure to comply with the presentment of claims statutes is an affirmative defense, that the County must plead.

In 1980 when Briscoe commenced this action and asserted its breach of contract claims in its counterclaim in reply, NRS 41.036 (later amended 1981 Stats. p. 1885 and 1983 Stats. p. 103) provided that any claim against any political subdivision in the state must be presented to the proper authority within six months from the time the cause of action accrued. The 1983 amendment removed the presentment requirement.

In 1980 NRS 244.245 (later amended 1981 Stats. p. 1887) provided that no person shall sue a county in any case for any demand unless he shall first present his claim or demand to the Board of County Commissioners. The 1981 amendment removed this presentment requirement.

In 1980 NRS 244.250 provided, and still provides:

> 1. All unaudited claims or accounts against any county shall be presented to the board of county commissioners within 6 months from the time such claims or accounts become due or payable.

> 2. No claim or account against any county shall be audited, allowed or paid by the board of county commissioners, or by any other officer of the county, unless the provisions of subsection 1 are strictly complied with.

Whether it be said that Briscoe's breach of contract and other claims accrued before its complaint and its counterclaim in reply were filed in 1980 or thereafter, one Nevada presentment of claim statute was in effect from 1980 to date and that is NRS 244.250. Thus, there is no need to consider NRS 41.036 and NRS 244.245. From the record, it appears clear and is implicitly admitted by Briscoe that Briscoe did not formally present any of the claims alleged in its amended complaint to the Board of County Commissioners of Clark County, Nevada, at any time and certainly not within six months of the time such causes of action accrued, as NRS 244.250 requires.

This Court holds that NRS 244.250 is by its terms applicable to Briscoe's claims in this case and that it was not formally complied with by Briscoe before or after this action was commenced. The County seeks an order dismissing all of Briscoe's claims because of such noncompliance.

In *Turner v. Staggs*, 89 Nev. 230, 510 P.2d 879 (1973), the Nevada Supreme Court held that the notice of claim requirements found in statutes requiring presentment of claims against the County within six months, as a condition precedent to bringing an action thereon, as applied to governmental torts, denied due process and equal protection under the Fourteenth Amendment to the Constitution of the United States.

In *L-M Architects, Inc. v. Sparks*, 100 Nev. 334, 683 P.2d 11 (1984), the City of Sparks refused to pay *L-M Architects*, presumably for architectural services rendered the City because *L-M* did not comply with NRS 268.020, which reads:

> "1. All demands and accounts against any incorporated city in this state, must be presented to the city council of the city, in writing, within 6 months from the time the demands or accounts became due.
>
> " . . . .
>
> "3. No demand or account against any incorporated city in this state may be audited, considered, allowed or paid by the city council or any other officer or officers of the incorporated city unless the provisions of subsection 1 are strictly complied with."

It is noted that NRS 268.020 and NRS 244.250 are nearly identical. *L-M Architects* claimed that NRS 268.020 was unconstitutional, violating the due process and equal protection clauses of the Nevada Constitution. The Nevada Supreme Court refused to apply *Turner v. Staggs* to a contract case and said that it was unwilling to invalidate the presentment of claims statutes in contract cases, *Turner* being limited to tort cases. The Court states, in part:

> Individuals or corporations that voluntarily contract with governmental units assume the burden of complying with its procedures for satisfying claims. In this regard a claim statute does not, as was the case in *Turner*, amount to a trap for the unwary. The statute is properly applicable in this case.

In *State of Nevada v. Capital Convalescent Center, Inc.*, 92 Nev. 147, 547 P.2d 677 (1976), the Court, relative to presentment of claims, states at pp. 151 and 152, 547 P.2d 677:

1. First State claims that the district court lacked subject matter jurisdiction in the case, because Convalescent failed to comply with NRS 41.036 and NRS 353.085. We do not believe that the aforementioned statutes have any application in the instant case. Here, State initiated the action against Convalescent, and Convalescent filed a compulsory counterclaim. NRCP 13(a), (c). It would be anomalous to hold that a defendant, in court in an action he did not bring, is required to plead a counterclaim against the State because it is compulsory under Rule 13(a), but once plead, his counterclaim is subject to dismissal on the ground that he had not, before being sued, taken affirmative action as set forth in NRS 41.036, *supra*. Such a conclusion is consistent with the purpose of the statute, which is to prevent the State, a county, or a city from being surprised by claims it has not had time to consider administratively. As long as the same transaction or occurrence is involved, surprise is minimized. Cf. *Frederick v. United States,* 386 F.2d 481 (5th Cir. 1967). The district court did have jurisdiction to entertain Convalescent's counterclaim.

In *Alper v. Clark County,* 93 Nev. 569, 571 P.2d 810 (1977), the Supreme Court held that the presentment of claims statutes should not be construed to apply to actions for inverse condemnation for to do so would deny due process, a constitutionally guaranteed right under the Fourteenth Amendment. The Court further held that since inverse condemnation is an action to vindicate a right created and guaranteed by the Fifth Amendment to the United States Constitution, an application of the presentment of claims statutes would allow the state to impose preconditions to suit on a federally created and protected right.

In *Metropolitan Water District v. State of Nevada*, 99 Nev. 506, 509, 665 P.2d 262 (1983) the Court stated:

> We have previously held that a county's claims statutes should not apply where to do so would deny property owners due process rights. *See Alper v. Clark County*, 93 Nev. 569, 571 P.2d 810 (1977), *cert. denied*, 436 U.S. 905 [98 S.Ct. 2235, 56 L.Ed.2d 402] (1978). Similar reasoning requires that the three month statutory period of limitations specified in NRS 361.420(3) should not be held to apply where to do so would deprive the Water District of a fundamental constitutional right, that of equal protection under the law.

Briscoe seeks to come within the rule of *Convalescent*, supra, arguing that its counterclaim in reply, filed September 15, 1980, was compulsory since the County had alleged a breach of contract against Briscoe in its answer and counterclaim, filed on July 31, 1980.

Since the Federal Rules of Civil Procedure do not provide for a pleading called counterclaim in reply, the filing of the same setting forth Briscoe's breach of contract claim against the County in response to the County's breach of contract claim against Briscoe, cannot be said to be compulsory. The proper way was what Briscoe eventually did, move for leave to file an amended complaint setting forth Briscoe's breach of contract claims against the County. Furthermore, the breach of contract claims in Briscoe's counterclaim in reply are substantially different than those set forth in the amended complaint.

It is noted that in *Convalescent*, the Supreme Court of Nevada stated that the purpose for the presentment of claims statutes was to prevent the governmental unit from being

surprised by claims it had not had time to consider administratively.

Justice Thompson, dissenting for other reasons, in *Turner* said, at page 241 of 89 Nev. 230, 510 P.2d 879:

> The purpose of a claim statute is to enable the governmental agency to make an early investigation of the claim, of the claimant, and to marshal evidence promptly at a time when it is possible to do so. *City of Reno v. Fields*, 69 Nev. 300, 250 P.2d 140 (1952); *Brown v. Board of Trustees, Etc.* [303 N.Y. 484], 104 N.E.2d 866 (N.Y. 1952).

[14] Briscoe argues that the filing of the counterclaim in reply charging the County with breach of contract, the numerous disputes between Briscoe and the County representatives memorialized in correspondence, and the many telephone calls to County representatives and meetings with such representatives and with County Commissioners, all fulfilled the purpose of presentment of claims statutes and amounts of substantial compliance with such statutes. This Court agrees that the purpose of the statutes as set forth by the Supreme Court of Nevada have been fulfilled in this case and that Briscoe has substantially complied with NRS 244.250, although Briscoe's claims were not formally presented to the Board of County Commissioners. But is substantial compliance enough? The County says no, that formal compliance is required and that Briscoe, having failed to do so, should be thrown out of court.

Of course this Court must apply Nevada case and statutory law. With the exception of the *L-M Architects* case, the Nevada Supreme Court in the cases cited above has found cause to excuse strict compliance with presentment of claims statutes. Also, in many of the cases from other jurisdictions cited by

Briscoe in its briefs, these courts have found a way around presentment of claims statutes.

Were this Court free to follow its own view, it would be inclined to say that once the County entered into the contract with Briscoe to build the waste water treatment plant, the contractor could sue for breach of contract and need not comply with the presentment of claims statutes; that by so contracting, the County waives compliance with presentment statutes although, by its terms, the contract does not say so; that the County should be estopped to claim noncompliance since it had notice of the substantial compliance as mentioned aforesaid. Were the Court free to chart its own course, it would say that despite the *L-M Architects* case, the application of claims statutes here would likely deny due process and equal protection under the Fourteenth Amendment to the Constitution of the United States and this Court would, if it had a free hand, probably apply *Turner* to contract cases. It would seem that Briscoe is correct when it argues in its brief (Document #791, p. 38, lines 12-28, inclusive):

> "Applying the reasoning of the foregoing cases to this case, it is clear that the notice of claim statute held unconstitutional in *Turner v. Stages*, supra, as applied to governmental torts, unjustifiably discriminates against persons with contract claims against a county, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.
>
> "The notice of claim statutes deny to persons damaged by governmental misfeasance or malfeasance in the performance of contractual obligations the right to recover unless they provide the government with notice within a short time after they occur. This prerequisite to contract lability [sic] has no counterpart in actions between private parties. The statutes thus create two

> classes of contracting parties, governmental and non-governmental, and grant the one a procedural advantage not available to the other. Concommitantly, they produce two classes of persons damaged by breaches of promise, and place a substantial burden on the right to bring an action on one of them."

This Court does not wish to exalt technical form over substance and throw Briscoe out of court. Whether unconstitutionality, waiver, estoppel, substantial compliance or some other grounds are assigned as the reason, it seems it would be unconscionable to dismiss Briscoe's claims for such technical noncompliance.

The motion to dismiss for Briscoe's failure to comply with NRS 244.250 is denied without prejudice to reconsidering the same at the close of Briscoe's case in chief or at the close of all evidence. All evidence that supports the arguments of unconstitutionality, waiver, estoppel, and substantial compliance should be adduced by Briscoe in its case in chief and thereafter evidence contra thereto offered by the County. The constitutional legal and equitable issues should be fully researched by counsel for both parties and further briefs submitted as motions for directed verdict or responses in opposition thereto.

In all other respects, the motion to dismiss is denied.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 23, 1985

MEMORANDUM TO ALL: JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, COURT OF INTERNATIONAL TRADE

SUBJECT: Social Security Coverage of Senior Judges

On Friday Congress adjourned its 1985 session *sine die* without taking the expected action to continue the exemption of *senior judges* from FICA taxation and coverage of their judicial service under the Social Security system. As you may be aware, the existing exemption expires on December 31, 1985. Therefore, at least briefly in the calendar year 1986, senior judges who continue to render judicial duties will have their salaries subject by law to the imposition of FICA tax for those months in which judicial service is performed.

I should emphasize that most informed observers expect Congress to act in 1986 to restore the statutory exemption of senior judges from Social Security taxation so that they may perform judicial work without suffering a financial penalty thereby. Realistically, however, such action should not be anticipated before February because Congress does not reconvene until January 21. *I must therefore reluctantly advise senior judges who wish to protect against having deducted from their salaries the 7.15 percent FICA tax to cease performing judicial duties during the first 60 to 90 days of 1986.*

Background of Problem

As you may recall, the prospect of senior judges being confronted with the FICA tax as a financial disincentive to work arose from the Social Security Amendments of 1983, Public Law No. 98-21, which for the first time brought justices and judges of the United States within the coverage of the Social Security system. Section 101(c) of this law amended the Social Security Act and the Internal Revenue Code to provide that the term "wages" for the purposes of coverage and taxation under Social Security would include the salary paid to a judge retired from regular active service under 28 U.S.C. § 371(b) for any period in which he or she performs judicial service by designation and assignment in accordance with 28 U.S.C. § 294.

In enacting this provision Congress mandated that a senior judge would be subject to FICA tax on the judicial salary for those months in which judicial work is performed, thus creating a financial incentive for senior judges to decline to be designated for any further duties and thereby continue to draw the judicial salary assured by section 371(b) without making it covered "wages" for Social Security purposes. In addition, the inclusion of the judicial retirement salary as "wages" means that a senior judge under 70 years of age who continues to work will be denied Social Security benefits or have a reduced entitlement thereto under the so-called "earnings test," which ceases to operate after age 70.

Before the 1983 Social Security Amendments took effect, Congress was persuaded to amend section 101(c) to delay its effective date until December 31, 1985, so that senior judges could continue to work without penalty until the Judicial Conference had an opportunity to study the prospective impact of Social Security coverage upon the Federal Judiciary. There

was uncertainty at the time as to how many judges would benefit by added Social Security credit, in contrast with those who would effectively pay FICA tax without achieving sufficient additional service credit to make them eligible for benefits or improve their benefit entitlement.

The Judicial Conference received a study on this subject, reflecting the personal financial situations of nearly 800 Federal judges, in March 1985. At that time the Conference adopted a resolution recommending that Congress offer to each senior judge upon retirement an option whether or not to continue under Social Security coverage. It further recommended that the same option be offered to all active judges who held the judicial office prior to April 20, 1983, the enactment date of the 1983 Social Security Amendments. As explained, Congress has now adjourned without acting upon these recommendations, which were offered nearly a year ago.

"Judicial Duties" Encompassed

Because of the foregoing statutory situation, the Administrative Office will be required as of January 1, 1986, to withhold from the salary paid to each senior judge the FICA tax of 7.15 percent for every month thereafter in which that judge performs judicial service. Assuming that Congress does not act to correct this situation, a senior judge who elects to continue to sit would have to pay such tax by payroll deduction each month until his aggregate salary for such months when judicial duties are performed equals the Social Security wage base of $42,000 for calendar year 1986, at which time the FICA tax deductions would cease. This means that the maximum FICA tax liability for 1986 will be $3,003.

As indicated, section 101(c) of the 1983 Amendments applies the Social Security Act and Federal Insurance Contributions Act provisions to senior judges only for those

months in which they perform "service under the provisions of section 294 of title 28, United States Code (relating to assignment of retired justices and judges to active duty)." Thus senior judges who do not wish to pay FICA tax are constrained only to avoid the performance of duties in the disposition of cases and controversies such as to require that they be designated and assigned by the Chief Justice or chief judge of their circuit under section 294. They are not prohibited, for example, from performing strictly ceremonial duties or from serving on committees of the Judicial Conference and participating actively in the work of those committees.

Although the statutory provisions involved are unclear and have yet to be tested, it further appears that a senior judge could, without being subject to the FICA tax, complete work in January on opinions, memoranda, and other written matters necessary to the orderly termination of judicial work undertaken during 1985. As you may be aware, it is provided by 28 U.S.C. § 296 that a judge who has sat by designation and assignment may decide or join in the final disposition of all matters submitted to him during the designation period and in the consideration and disposition of applications for rehearing or further proceedings in such matters, notwithstanding the expiration of the designation and assignment. It is evident nevertheless that a senior judge will be liable for the FICA tax if he or she undertakes any sittings on court of appeals panels or holds district court proceedings on or after January 1.

Senior Judge Staff and Quarters

As explained, it is anticipated that Congress will act in the near future to extend or make permanent the exemption of senior judges from Social Security. Accordingly, any decision of a senior judge to withdraw from judicial duties on account of this problem should be viewed as only temporary and of foreseeably short duration. Under the policies of the Judicial Conference,

senior judges are assigned staff and space on the premise that they are performing "substantial judicial duties," as certified by the circuit judicial councils.

Thus the Administrative Office will take no action in the first 90 days of calendar year 1986 to terminate the staff or reassign the quarters of senior judges who temporarily cease to perform judicial work, so long as the circuit councils remain satisfied that such judges are likely to become available for designation and assignment again in the foreseeable future and that the staff of these senior judges may be reassigned in the meantime to active judges or to other necessary court functions.

Future Outlook

When Congress adjourned last week, an amendment that would effectively repeal section 101(c) of the 1983 Amendments and permanently exempt senior judges from Social Security coverage was pending before both Houses as section 769C of H.R. 3128, the "Consolidated Omnibus Budget Reconciliation Act of 1985." This provision had been added as a floor amendment in the Senate consideration of H.R. 3128, and the bill was passed by the Senate in this form. The House-Senate conference committee on H.R. 3128 accepted this facet of the bill and reported it back to both Houses with the amendment to relieve senior judges from Social Security intact. The Conference report on the bill failed of adoption by the House of Representatives for reasons having nothing to do with the merits of this issue.

We are hopeful that a bill containing the relief for senior judges from Social Security will be adopted by Congress early in 1986, thus freeing senior judges to render judicial service voluntarily without financial penalty. I assure you that my staff and I will do all that we can to assure passage of such

legislation.

/s/ L. Ralph Mecham

cc Circuit Executives
Clerks, United States Courts of Appeals
District Court Executives
Clerks, United States District Courts

No. 88-1607

(3)

Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CLARK COUNTY, NEVADA,

Petitioner,

—v.—

FRANK BRISCOE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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12pp

Rule 28.1 Listing

There are no parents, subsidiaries (except wholly owned subsidiaries) or affiliates of respondent Frank Briscoe Company, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1607

CLARK COUNTY, NEVADA,

Petitioner,

—v.—

FRANK BRISCOE COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The petition in this diversity case presents nothing more than the reargument of two issues of Nevada law that were fully considered by the Court of Appeals.

COUNTER-STATEMENT OF THE CASE

This petition arose out of a contract dispute between the parties over the construction of an advanced waste water treatment plant. In May of 1980, during construction, respondent Briscoe, the general contractor, brought a diversity suit against petitioner Clark County seeking declaratory and equitable relief, but not damages, in order to enforce its understanding of the contract. The County counterclaimed for damages alleging breach of contract. Thereupon, Briscoe timely filed its compulsory counterclaim-in-reply against the County for breach of

contract damages. (A. pp. 5a, 10a) Ultimately, after the completion of construction in April of 1982, Briscoe amended its complaint. (A. p. 6a) In *Frank Briscoe Co. v. County of Clark*, 643 F. Supp. 93 (D. Nev. 1986), the District Court dismissed much of the amended complaint. After a trial of 87 days, 2,200 exhibits, and 19 expert witnesses, the District Court granted a partial directed verdict for the County. (A. p. 6a) The District Court submitted to the jury thirteen claims from a single count in Briscoe's amended complaint. That submission was accompanied by ten special interrogatories, which required the jury to determine specifically whether the County had breached its contract. The jury returned findings for Briscoe on eight of the ten interrogatories, and it determined that the County was responsible in damages for 612 out of 667 days of delay. After Briscoe accepted a small remittitur, the District Court entered judgment for Briscoe, and the County appealed to the Ninth Circuit. (A. pp. 6a-7a) After fully considering the County's claims on the merits, the Ninth Circuit affirmed. *Frank Briscoe Company, Inc. v. Clark County*, 857 F.2d 606 (1988). (A. p. 2a) This petition followed.

REASONS FOR DENYING THE WRIT

This petition presents no question appropriate for this Court's action. The County argues that the jury instructions erroneously imposed certain warranty responsibilities on the County, and that Briscoe's entire claim for damages was barred *in limine* because Briscoe failed to comply with a Nevada notice-of-claim statute. The Court of Appeals rejected both contentions on the merits, and neither of its holdings involves anything other than a question of Nevada law. Misconstruction of state law by a court of appeals in a diversity case is not a ground for certiorari. See Rule 17.1 of the Rules of the Supreme Court; Stern, Gressman and Shapiro, *Supreme Court Practice*, § 4.10, p. 212 (6th ed. 1988). Petitioner's final contention (pp. 15-20) that a trial continuance and evidentiary rulings resulted in a denial of a fair trial is frivolous, and its completely fact-specific character presents no issue for this Court.

A. The Warranty Issue

The County's petition (p. 6) contends that the Ninth Circuit's holding imposes warranty liabilities on the County "drastically shifts the allocation of risks between governmental entities and contractors in construction law," that if followed the Ninth Circuit's holding "could have a staggering budgetary impact on the United States, each state . . ." and that it is in conflict "with an often-cited landmark decision of the Court of Claims."

These assertions are meritless. It is helpful to begin with what the Ninth Circuit actually did. After careful review, the Ninth Circuit concluded that the jury in this case had been properly instructed:

> The County does not question the continuing vitality of the *Spearin* doctrine [*United States v. Spearin*, 248 U.S. 132 (1918)];, but argues that the court in this case imposed an independent warranty of completion by a particular date on the County irrespective of whether it supplied faulty specifications. This is simply incorrect. None of the special interrogatories submitted to the jury can be read to impose liability for work delays absent specific acts or omissions by the County causing the delay. We reject the notion that the County was subject to "strict" liability for delays in the plant's completion.
>
> The court's instruction correctly stated the law and directly related to an issue in the case . . . .

(857 F.2d at 612; A. p. 14a) The County's effort to inflate this holding about the adequacy of a particular set of jury instructions into a plain and direct conflict between the Ninth Circuit and the Claims Court defies credulity. The legal principles urged by the County (e.g., no strict liability) were expressly adopted by the Ninth Circuit. (857 F.2d at 611-12; A. pp. 12a-14a) Quite plainly, whether a particular set of jury instructions in one case adequately conveyed those otherwise acknowledged and settled legal principles is an entirely fact-specific issue and presents no question for this Court. This Court "does not grant

certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elective Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

The County's thin effort to create a "conflict" between the Ninth Circuit and the Claims Court suffers from yet another fundamental defect. No such "conflict" can exist: there is no general public law of contracts. There is the law of Nevada, the law of Minnesota, the law of New York, etc., and the law with respect to federal contracts. But the law of Nevada cannot "conflict" with any federal law of public contracts; each government is entirely free to go its own way.[1] And, of course, "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford University*, 109 S.Ct. ____, ____ (1989).[2] Moreover, the Ninth Circuit's "erroneous" views on the Nevada law of public construction contracts poses no conceivable threat of harm to any federal interest. In fashioning federal law, the Claims Court is not bound by the Ninth Circuit's view of the Nevada law on public construction contracts.

B. Notice of Claim Statute

Petitioner concedes (p. 12 n. 7) that Briscoe's original action for declaratory equitable relief was not subject to the Nevada notice-of-claim requirement because it sought only equitable relief. *Hart v. City of Las Vegas*, 73 Nev. 29, 31, 307 P.2d 617, 618 (1957). The Ninth Circuit held that the notice-of-claim statute was not applicable when Briscoe filed a compulsory

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1 See, for example, *Aiken County v. BSP Dev. of Envirotech Corp.*, 866 F.2d 661 (4th Cir. 1989), applying South Carolina law to a suit by a county against a subcontractor supplying a heat treatment system for a waste water treatment plant.

2 Petitioner's premise that there is some "general" law of public works construction is, at bottom, simply an invocation of *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842), a doctrine interred over fifty years ago by this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

counterclaim-in-reply to the County's counterclaim. (A. pp. 10a-11a) In so holding, the Ninth Circuit relied on *State v. Capital Convalescent Center*, 92 Nev. 147, 547 P.2d 677 (1976), where the Nevada Supreme Court had held that a defendant's failure to comply with an analogous notice statute did not bar it from filing a compulsory counterclaim for damages. The Ninth Circuit rejected the County's attempt to limit *Capital Convalescent Center*, and concluded that "Briscoe's view of Nevada law is the better one." (857 F.2d at 611; A. p. 11a) The Court clearly understood that "the interpretation of Nevada's notice-of-claim statute is a question of state law." (857 F.2d at 610; A. p. 9a)

Even were the Ninth Circuit's view of Nevada law wholly mistaken, that Court's misconstruction involves only an issue of state law and thus no basis for review in this Court. Rule 17.1, *supra*. Petitioner seeks to escape that fact by insisting that the Ninth Circuit's ruling "runs afoul of the constitutional barrier of sovereign immunity." (p. 13) Not a single decision is cited in support of this startling argument. Nor could it be. The constitutional protection for state sovereign immunity has nothing to do with this case. No judgment has been entered against the state, or state officials. For a hundred years it has been settled that the state's sovereign immunity from suit in the federal court does not extend to such subordinate political bodies as counties or municipalities. *Lincoln County v. Luning*, 133 U.S. 529 (1890), long ago held that the eleventh amendment does not bar an individual suit against a county for non-payment of a debt.[3] There is simply nothing in petitioner's belated attempt to transform an ordinary question of the interpretation of state law into an eleventh amendment issue.

Of course, as a matter of its own state substantive law, Nevada can restrict suits against its governmental units by pro-

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3 See also, for example, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979); *Welch v. Texas Dept. of Highways and Pub. Transp.*, _____ U.S. _____ (1987), 107 S.Ct. 2941, 2953 (plurality opinion).

hibiting them entirely, or, as here, by requiring that litigants comply with certain conditions precedent—such as giving notice of claims—before instituting suit. There is no dispute that the Nevada notice of claim statute must be enforced in a diversity suit. *Felder v. Casey*, 108 S.Ct. 2302, 2313 (1988). The Ninth Circuit understood that clearly, and for that Court the only issue was the meaning of the Nevada statute. The Court's resolution of that issue raises only a matter of Nevada substantive law.

C. Fair Trial

In the court below petitioner argued that error was committed in the jury instructions, by reason of a continuance in the trial, and by use of certain evidentiary rulings. These claims were carefully considered and rejected by the Court of Appeals. (857 F.2d at 611-14; A pp. 11a-20a) Petitioner's efforts to inflate these rulings into a "cumulative" (p. 15) denial of due process is a transparently thin effort to reargue here what was lost below. Moreover, the heavily fact-specific claim that the "cumulative" effect of these "errors" rendered an 87 day trial fundamentally unfair presents no issue for this Court. To repeat *Johnston*, *supra*, this Court "does not grant certiorari to review evidence and discuss specific facts."

CONCLUSION

The petition for certiorari states no ground remotely within Rule 17.1 of the Rules of this Court, and accordingly, the petition should be denied.

Respectfully submitted,

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